Supreme Court, U.S.
FILED

01 455 SEP 10 2001

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

FRANCONIA ASSOCIATES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

◊

GRASS VALLEY TERRACE, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI

Jeff H. Eckland,
Counsel of Record
William L. Roberts
Mark J. Blando
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

Attorneys for Petitioners

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

231 pp

QUESTIONS PRESENTED

This case presents the question of when the six-year statute of limitations set forth in the Tucker Act, 28 U.S.C. § 2501, begins to run where the federal government, by statute, attempts to modify its contracts as it did in the *Winstar* and *Mobil* cases. The specific issues presented are:

1. Whether the government can eliminate contract rights *ipse dixit* through the enactment of legislation aimed at relieving the government of its contractual obligations, so that an aggrieved party's contract claim accrues immediately when a statute is passed announcing that the government might not perform its future contract obligations, rather than at the later date when the government actually fails to perform?

2. Whether the "as-applied" taking claims of property owners participating in a government housing program accrued immediately upon the *enactment* of legislation that expressly left open the possibility that the owners still would be permitted to leave the program and use their properties as they desired, rather than at the later date when the government *applied* the legislation to render a decision on the permitted use of the properties?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are Petitioners in *Franconia Associates v. United States:*

Dublin Plaza, Inc.
Evergreen Manor Associates
Fox Ridge Phase II
Franconia Associates
Marilyn Graham
Greenway of Altoona Associates, Phase I
Greenway of Newton Associates, Phase I
David A. Hodges, Sr.
David A. Hodges, Sr. and Joanne M. Hodges
Phoebe J. Perri
Pine Needles Apartments
Prairie Village of Altoona Associates
Prairie Village of Grimes Associates
Prairie Village of Huxley Associates
Prairie Village of LaPorte City Associates
Prairie Village of Slater Associates
Prairie Village of State Center Associates
R.C. Getty Apartments
R.C. Mo Apartments
R.C. Pierre Apartments
R.C. Springs Apartments
Scenic Valley Associates
Timberbrook Properties
Valley Associates
Brian E. Wells

The following parties are Petitioners in *Grass Valley Terrace v. United States:*

Margorie W. Kassner
Eileen R. Kothe
NRCB Limited Partnership

Peters, Williams & Kubota
Pine Needle Apartments Limited Partnership
Richard and Beatrice Schmidtbauer
The Highlands, a Limited Partnership

The following parties are plaintiffs in the trial court action in *Franconia Associates v. United States,* but were not appellants before the Federal Circuit and are not Petitioners herein:

Eastwood Apartments
Greenway of Altoona Associates, Phase II
Prairie Village of Adel Associates
Prairie Village of Parkersburg Associates
Tucker Properties
Tucker Properties II

The following parties are plaintiffs in the trial court action in *Grass Valley Terrace v. United States,* but were not appellants before the Federal Circuit and are not Petitioners herein:

Grass Valley Terrace
Jefferson Commons
Ripon Manor
Rural Community Builders
Waterloo Glen

Pursuant to Rule 29.6, Petitioners state that of the forty-three parties listed above, only one, Dublin Plaza, Inc., is a corporate entity. All other Petitioners and parties to the proceedings below are either individuals, partnerships, or limited partnerships. There are no parent corporations or publicly held companies that own ten percent or more of the stock of Dublin Plaza, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CONTENTS OF APPENDIX xi

TEXT OF STATUTES AND REGULATIONS xiii

CONSOLIDATED PETITION FOR CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Overview 2

II. Statement of Facts 4

A. The Section 515 Program 4

B. Subsequent Legislation 7

C. Application of the Legislation 9

III. Proceedings Below 10

A. Proceedings Before the Court of Federal Claims 10

B. Proceedings Before the Federal Circuit 12

REASONS FOR GRANTING THE PETITION 13

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That The Legislation Constituted An Immediate Breach Of Petitioners' Prepayment Option 14

A. The Federal Circuit Improperly Held That The Government Can "Eliminate" The Contract Rights Of Its Business Partners By Passing Legislation. 15

B. ELIHPA Constituted An Anticipatory Repudiation Of Petitioners' Prepayment Option, Which Did Not Start The Statute Of Limitations 17

C. The Federal Circuit Created Contract Rules Applicable Only To The Government In Holding That The FmHA Had No Affirmative Obligation To Accept Prepayment Requests Made By Owners. 21

II. The Federal Circuit Defied This Court's Precedent By Holding That Petitioners' Taking Claims Accrued Upon The Enactment Of Legislation That Expressly Left Open The Possibility That Petitioners Would Be Permitted To Use Their Properties As They Desired. 24

A. The Legislation At Issue Demands An "As Applied" Takings Analysis. 24

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims. 27

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government. 30

CONCLUSION 30

TABLE OF AUTHORITIES

Federal Cases

Adams v. United States, 42 Fed. Cl. 463 (1998) 14, 16

Alaska Pulp Corp. v. United States, 48 Fed. Cl. 655 (2001) 16, 19

Bayou des Familles Development Corp. v. United States, 130 F.3d 1034 (Fed. Cir. 1997) 29

Biddison v. Chicago, 921 F.2d 724 (7th Cir. 1991) 26

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 13

Cardinal Chemical Co. v. Morton International, Inc., 508 U.S. 83 (1993) 15

Cienega Gardens v. United States, 38 Fed. Cl. 64 (1997), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998) 6, 7

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 14

Conoco Inc. v. United States, 35 Fed. Cl. 309 (1996) 18

Cooke v. United States, 91 U.S. 389 (1875) 14

Dolan v. City of Tigard, 512 U.S. 374 (1994) 30

Far West Federal Bank v. Office of Thrift Supervision, 119 F.3d 1358 (9th Cir. 1997) 19

Franconia Associates v. United States, 43 Fed. Cl. 702, *aff'd*, 240 F.3d 1358 (Fed. Cir. 2001) ..... *passim*

Gilbert v. Cambridge, 932 F.2d 51 (1st Cir. 1991) 25

Grass Valley Terrace v. United States, 46 Fed. Cl. 629 (2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) ..... *passim*

Greenbrier v. United States, 193 F.3d 1348 (Fed. Cir. 1999) 12, 23, 26-29

Gulf Power Co. v. FCC, 208 F.3d 1263 (11th Cir. 2000) 25

Hercules Inc. v. United States, 514 U.S. 1049 (1995) 15

Hermanowski v. Acton Corp., 580 F. Supp. 140 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984) 20

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 25, 28

Holm v. CalEnergy Co., 229 F.3d 1157, 2000 WL 975177 (9th Cir. 2000) 20, 23

Kimberly Associates v. United States, __ F.3d __, 2001 WL 930454 (9th Cir. Aug. 17, 2001) 16

Kinsey v. United States, 852 F.2d 556 (Fed. Cir. 1988) 17

Lampf v. Gilbertson, 501 U.S. 350 (1991) 13

Levald, Inc. v. Palm Dessert, 998 F.2d 680 (9th Cir. 1993) 26

Lucente v. IBM Corp., 146 F. Supp. 2d 298 (S.D.N.Y. 2001) 23

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 24

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 14-19, 22

National Adver. Co. v. Raleigh, 947 F.2d 1158 (4th Cir. 1991) 25

Norco Construction v. King County, 801 F.2d 1143 (9th Cir. 1986) 26

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001) 24

Pennell v. San Jose, 485 U.S. 1 (1988) 28

Perry v. United States, 294 U.S. 330 (1935) 14

Plaintiffs in Winstar-Related Cases v. United States, 37 Fed. Cl. 174 (1997) 19, 26

Roehm v. Horst, 178 U.S. 1 (1900) 17

Saewitz v. Epstein, 6 F. Supp. 2d 151 (N.D.N.Y. 1998) 23

Schism v. United States, 239 F.3d 1280 (Fed. Cir. 2001) 19

Stone Forrest Industrial v. United States, 973 F.2d 1548 (Fed. Cir. 1993) 19

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 24

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 25, 28

United States v. Winstar Corp., 518 U.S. 839 (1996) 14, 15, 22

Williamson County Reg'l Planning Commission v. Hamilton Bank, 473U.S. 172 (1985) 24

State Cases

Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Ore. 1964) 20

Rossi v. Oristian, 376 N.Y.S.2d 295 (N.Y. App. Div. 1975) 20

Docketed Cases

Adams v. United States, No. 96-699C 14

Allegra Villa v. United States, No. 98-823C 14

Atwood-Leisman v. United States, No. 98-815C 14

Bellas Domas v. United States, No. 98-826C 14

Other Cases

Horchster v. De la Tour, 118 Eng. Rep. 922 (Q.B. 1853) 17

42 Op. Att'y Gen. 417 (Dec. 29, 1969) 7

Federal Statutes, Regulations, and Rules

28 U.S.C. § 1254(1) (1994) 1

28 U.S.C. § 2501 (1994) 1

42 U.S.C. § 1472(c) (1994) 1, 8-10, 22, 25

42 U.S.C. § 1485 (1994) 5

7 C.F.R. § 1822.95(c) (1978) 6

7 C.F.R. § 1866.2 (1983) 22

7 C.F.R. § 1866.3 (1983) 22

7 C.F.R. § 1965.90(b) (1987) 22

7 C.F.R. § 1965.90(e) (1983) 22

7 C.F.R. § 1965.215(c) (2000) 1, 26

7 C.F.R. Pt. 1965, Subpart E, Ex. A-4 (2000) 9

Fed. R. App. P. 28(j) 19

Legislative Materials

125 Cong. Rec. 18204 (1979) 5

H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 2359 7

Pub. L. No. 96-153, § 503, 93 Stat. 1134 (1979) 7, 22

Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980) 7

Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) 2, 8

Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992) 9

Treatises

Am. Jur. 2d, CONTRACTS (1990) 17

Corbin, CONTRACTS (1964) 17, 24

Corbin, CONTRACTS (1951) 23

Corman, LIMITATION OF ACTIONS (1991) 17

Jaeger, WILLISTON ON CONTRACTS (3d ed. 1968) 17

Restatement (Second) of Contracts (1981) 17, 18, 19

Books and Articles

Belden & Wiener, HOUSING IN RURAL AMERICA (1999) 7, 14

Black's Law Dictionary (7th ed. 1999) 18

Cohen & Mattis, *Prepayment Rights: Abrogation by the Low-Income Housing Preservation and Resident Homeownership Act of 1990*, 28 Real Prop. Prob. & Tr. J. 1, 2-4 (1993) 4

Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. Cinn. L. Rev. 565 (2001) 17

CONTENTS OF APPENDIX

Relevant Decisions and Orders

Decision of the Federal Circuit in *Franconia Associates v. United States* (Feb. 15, 2001) A1

Order of the Federal Circuit in *Grass Valley Terrace v. United States* (May 17, 2001) A15

Decision of the Court of Federal Claims in *Franconia Associates v. United States* (May 6, 1999) A17

Decision of the Court of Federal Claims in *Grass Valley Terrace v. United States* (April 12, 2000) A45

Order of the Federal Circuit Denying Rehearing in *Franconia Associates v. United States* (June 19, 2001) A69

Text of Relevant Legislation and Regulations

Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) A71

28 U.S.C. § 2501 (1994) A82

42 U.S.C. § 1472(c) (1994) A83

7 C.F.R. § 1965.215 (2000) A91

Pleadings Below

First Amended Complaint in *Franconia Associates v. United States* (June 25, 1997) A106

Complaint in *Grass Valley Terrace v. United States* (Sept. 15, 1998) A135

Other Materials

Declaration of P.J. Perri in *Franconia Associates v. United States* (May 18, 1999) (with exhibits) A157

Loan Agreement for Pine Needle Apartments (Jan. 24, 1979) A165

Promissory Note for Wishing Well Associates (Dec. 31, 1975) A176

Real Estate Mortgage for Wishing Well Associates (Dec. 31, 1975) A178

TEXT OF STATUTES AND REGULATIONS

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached hereto. *See* App. A71-105. The provisions most significant to the disposition of this petition are as follows:

28 U.S.C. § 2501 Time for filing suit

Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

42 U.S.C. § 1472(c) Prepayment and refinancing provisions

* * *

(4)(A) Agreement by borrower to extend low income use.

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

* * *

(5)(A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities . . .

* * *

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if –

* * *

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that –

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

7 C.F.R. § 1965.215 Borrower rejection of incentive offer – approving/disapproving prepayment

* * *

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. . . . To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

* * *

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206 (b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

* * *

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

CONSOLIDATED PETITION FOR CERTIORARI

Petitioners Franconia Associates, et al., and Grass Valley Terrace, et al. ("Petitioners"), respectfully petition this Court for a writ of certiorari to review two decisions of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

Franconia Associates v. United States, No. 97-381C, 43 Fed. Cl. 702 (May 9, 1999), *recons. denied*, 44 Fed. Cl. 315 (July 21, 1999), *aff'd*, No. 99-5123, 240 F.3d 1358 (Fed. Cir. Feb. 15, 2001), *reh. denied* (Fed. Cir. June 12, 2001).

Grass Valley Terrace v. United States, No. 98-726C, 46 Fed. Cl. 629 (Apr. 12, 2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) (*per curium*).

JURISDICTION

This petition seeks review of two closely-related decisions of the Federal Circuit. The Federal Circuit issued an opinion in *Franconia Associates v. United States* ("*Franconia*") on February 15, 2001. Petitioners then timely filed a Petition for Rehearing En Banc, which the Federal Circuit denied on June 12, 2001. In the interim, the Federal Circuit issued a *per curium* decision in *Grass Valley Terrace v. United States* ("*Grass Valley*") on May 17, 2001.

This Court has jurisdiction under 28 U.S.C. § 1254(1). On July 27, 2001, Petitioners timely filed an application for an extension of time, requesting permission to file a Consolidated Petition for Writ of Certiorari addressing both cases on September 10, 2001. The Court granted Petitioners' application by Order dated July 31, 2001, extending the filing deadline in *Grass Valley* until September 14, 2001.

STATUTES AND REGULATIONS INVOLVED

Tucker Act, 28 U.S.C. § 2501 (1994) (App. 82); 42 U.S.C. § 1472(c) (1994) (App. 83-90); 7 C.F.R. § 1965.215 (2000) (App.

91-105); Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) (App. 71-81).

STATEMENT OF THE CASE

I. Overview

Petitioners are owners of properties used as affordable housing in rural areas of the United States. The housing was financed by mortgages issued by the Farmer's Home Administration ("FmHA"),[1] an agency of the Department of Agriculture, pursuant to Section 515 of the Housing Act of 1949 (the "Section 515 program"). According to contracts executed by each owner upon entering into the Section 515 program and regulations then in effect, the owners had the option to prepay their mortgages at any time during their fifty-year mortgage terms. Upon prepayment, the owners could terminate their participation in the program and use their buildings as market-rent properties.

So long as the properties remained in the Section 515 program, the owners could earn only a marginal annual return representing a small percentage of their initial down payment. As a result, Petitioners intended from the very beginning to prepay their mortgages as soon as circumstances would allow in order to realize the full economic potential of their properties. Without the ability to terminate their participation in the program at some time before each of their full mortgage terms expired, none of the Petitioners ever would have entered into the program.

In 1988, however, Congress passed a law setting up a new scheme for determining whether FmHA would have to approve requests by owners to prepay. The new regime only allows an owner to prepay without any restrictions if the agency determines in its discretion that, among other

[1] Although the agency formerly known as the FmHA is now known as the Rural Housing Service, this petition, like the opinions below, will refer to the agency by its original name.

things, there is no longer a need for affordable housing in the area where the property is located. If the agency cannot make this determination, an owner desiring to leave the program must either agree to remain in the program for an extended period of time or risk losing the property through a forced sale to a public or non-profit entity.

Each of the owners in this action decided at some point following the passage of this legislation to exercise its prepayment option and leave the Section 515 program. However, none of them could, upon their intended prepayment dates, meet the statutory exception allowing the agency to accept requests to prepay without any restrictions. As a result, Petitioners remain trapped in the program and subject to its severe income restrictions with no reasonable means of escaping before their full fifty-year mortgage terms expire. Plaintiffs therefore brought suit, alleging counts for breach of contract and a taking of their property.

The Federal Circuit held in *Franconia*[2] that Petitioners' claims were barred by the six-year statute of limitations set forth in the Tucker Act, finding that both the contract claims and the taking claims accrued automatically on the date that the legislation was enacted. The decision was premised on a number of fundamental errors of law, including:

- The court exempted the government from ordinary contract law principles by holding that (1) the legislation, which was specifically targeted at relieving the government from its obligations under the contracts, immediately "eliminated" Petitioners' contract rights, (2) the legislation constituted an immediate breach of Petitioners' prepayment option, even though the contracts entitled owners to exercise

[2] The other decision at issue, *Grass Valley*, was a *per curiam* decision issued by the Federal Circuit following *Franconia*. The *Grass Valley* decision affirmed the dismissal, on limitations grounds, of contract claims that are materially identical to the contract claims in *Franconia*. Because the Federal Circuit did not issue a written opinion in *Grass Valley*, the discussion herein is focused on the court's analysis in *Franconia*.

this option *at any time* during their full mortgage terms, and (3) Petitioners' prepayment option imposed no reciprocal obligation on the government to *accept* prepayment requests made by owners, thus rendering the contracts illusory; and

• The court failed to recognize that, because the legislation expressly left open the possibility that owners would be permitted by the agency to prepay and use their properties as they desired, each owner's taking claim did not accrue until the FmHA applied the legislation by rendering a decision on the owner's prepayment request.

The Federal Circuit in effect held that every Section 515 owner in the country who might desire to prepay at some point during their fifty-year mortgage terms was required to bring suit within six years after the enactment of the statute in February 1988 on pain of having their claims time-barred, regardless of whether they had any intention of prepaying during that window of time. The decision thus contravenes the established precedent of this Court and wreaks havoc on settled principles of law. The decision also disposes of the claims of hundreds of housing owners who invested in the program based on express government commitments and who are now stranded in the program as a result of the government's failure to live up to its obligations. The decision extinguishes these owners' claims only because they failed to file suit prematurely.

II. Statement of Facts

A. The Section 515 Program

Beginning in the 1960s, the federal government established several programs encouraging private citizens to construct, own, and manage federally-assisted affordable housing units. *See* Cohen & Mattis, *Prepayment Rights: Abrogation by the Low-Income Housing Preservation and Resident Homeownership Act of 1990*, 28 REAL. PROP. PROB. & TR. J. 1, 2-4 (1993). The so-called "Section 515" program at

issue in this case was one such program. Section 515 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485), added to the Act in 1962, authorized the FmHA to enter into contracts with private owners to make loans for the purpose of developing housing for low- and moderate-income and elderly tenants in rural areas. Owners retained titled to their properties while in the program, but were permitted to collect only a minimal annual return on their initial investment.[3] App. A170. The owners also were required to accept only eligible persons as tenants, to charge no higher rents than permitted by FmHA, to maintain cash reserves, and to comply with certain regulations not inconsistent with the terms of their contracts. App. A169-72, A177, A181.

Mortgage loans under the program had terms of up to fifty years. App. A165, A176. Obviously, few owners would be willing or able to accept the income restrictions required by the program for such a long period of time, which likely would not even expire within their own lifetimes. Although certain tax benefits initially were available under the program, those benefits ran out as each project's depreciation schedule expired. *See* 125 Cong. Rec. 18204 (1979) ("The tax advantage in this type of project looks toward a maximum term of about 10 years."). Thus, unless owners could capitalize on their long-term investment in the housing units at some point during the normal useful life of those units, the strict limitations on the properties' income potential would have made the projects uneconomical and

---

[3] The return permitted under the program was 8% of the owners' "initial investment" in the property, *i.e.*, its down payment, rather than 8% of its equity in the property or its market value. App. A170. For example, an owner that made a $91,237 down payment on a project with a $1,238,000 mortgage would earn only a maximum of $7,299 per year so long as it remained in the program. *Id.* Assuming that after twenty years the owner built up $1,000,000 of equity in the property and that the market value of the property as a commercial apartment complex had risen to $2,000,000, the owner would still receive at most only $7,299 per year, which would amount to only 0.73% of its equity and only 0.36% of the property's market value.

no reasonable investor would have participated in the program. Something more was required to induce owners to enter into the program.

That "something more" was the termination option – the government's assurance that an owner could escape these income restrictions and convert the property to conventional market-rate housing by paying off the loan before the end of its term. Pursuant to the discretion conferred on it by Congress, the FmHA included the following provision in the promissory note executed by each owner:

> Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower.

App. A176. This provision reflected contemporaneous FmHA regulations. *See* 7 C.F.R. § 1822.95(c) (1978).

The termination option was a critical component of the Section 515 program from the perspective of both the owners and the government. None of the Petitioners would have entered into the program or signed its contract absent the right to prepay and leave the program at some time before the expiration of its mortgage term, at which point each owner could convert to market rents or sell the property based on its commercial market value. Petitioners thus entered into the program with specific long-term investment goals that could not be achieved absent the right to prepay and terminate their participation in the program. *See Cienega Gardens v. United States*, 38 Fed. Cl. 64, 75 (1997) (finding that under a similar housing program, prepayment served as one of the "primary incentives," an "essential aspect" of the program, and an "enticement" without which the owners would not have entered into the program), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998).[4]

[4] Petitioners did not, as the courts below assumed, invest in the Section 515 program to obtain a low-interest rate loan. *See* App. A3, A17, A46.

From the government's perspective, the ability of owners to prepay and ultimately use their properties as market-rate investments served as a chief inducement to recruit private parties to enter into the program. *Id;* Belden & Wiener, HOUSING IN RURAL AMERICA 122 (noting that the Section 515 program was "predicated on the assumption that private, profit-motivated owners could be enticed to build, own and operate low-income rental housing" and that "prepayment is wholly consistent" with this strategy). Further, the money received through prepayment could be used to finance additional rural housing under the program. *See* 42 Op. Att'y Gen. 417, 419 (Dec. 29, 1969).

B. Subsequent Legislation

Not surprisingly, as time passed, many owners began to exercise their termination option, prepaying their loans to realize the investment returns to which their contracts entitled them. *See* H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 2359. The FmHA maintained that it was contractually required to accept such prepayments despite concern that doing so would significantly reduce the supply of affordable housing. *Id.* (noting that FmHA "believes it must honor requests to prepay or refinance these loans").[5] To curb this potential

The effective interest rates on the loans (which were not in fact low, *see, e.g.,* App. A176) provided the owners no benefit whatsoever, because the *only* profit owners could receive while in the program was a minimal annual return on their initial investment. The true beneficiaries of the government subsidies that produced an effectively low interest rate are the tenants, in that the government subsidies permit rents to remain low.

[5] Congress initially responded by passing a statute in 1979 that restricted the FmHA's authority to accept prepayments of Section 515 loans. Pub. L. No. 96-153, § 503, 93 Stat. 1134 (1979). In response to the political uproar caused by this repudiation of the owners' rights, however, Congress repealed the statute in 1980 and restored the termination option for loans issued prior to 1979. The 1980 legislation also required new owners to agree to operate their properties as low-income housing for a minimum of 15 or 20 years. Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980).

loss of housing, Congress imposed a series of moratoriums from 1986 through 1988 greatly restricting the ability of Section 515 owners to prepay their mortgages. Before the last moratorium expired, on February 5, 1988 Congress enacted the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), *codified as amended at* 42 U.S.C. § 1472(c) ("ELIHPA") (App. A71-81).

Whereas the relevant contracts and regulations obligated the FmHA to accept prepayment requests made by owners "at any time at [their] option," ELIHPA drastically limited the circumstances under which the agency could accept such requests. First, ELIHPA prohibits the FmHA from accepting any prepayment until it has attempted to secure the owner's agreement to give up the termination option and extend the low-income use of the property for at least an additional twenty years. 42 U.S.C. § 1472(c)(4)(A) (App. A83).

Second, if an owner will not surrender its termination option and agree to extend the low-income use of the property, ELIHPA compels the owner, before exercising that option, to offer the property for sale to any qualified nonprofit organization or public agency for a six month period. *Id.* § 1472(c)(5). A buyer can be "qualified" by the FmHA only if it agrees to maintain the low-income use of the property, and no sale can be completed unless the agency approves the purchase price. *Id.* Although a hapless owner theoretically could prepay at the end of this "forced-sale" period if no "qualified" buyer emerges, the owner first has to gamble that its property will not be snatched away at a price not determined on the open market.

This change in the governing law is the basis for the two classes of plaintiffs in the original actions below – owners with claims based on pre-1979 contracts, whose original termination rights were restored by the 1980 legislation, and owners with claims based on post-1979 contracts, whose termination rights have always been exercisable only after a minimum of 15 or 20 years. Petitioners are all "pre-1979" owners, due to the fact that ELIHPA addressed only pre-1979 contracts and, as a result, only the pre-1979 claims were dismissed by the lower courts as untimely.

Third, if an owner is unwilling either to extend its participation in the program or subject itself to the six-month forced-sale process, ELIHPA permits an owner to prepay only if he or she agrees to maintain the low-income rental rates until the current tenants choose to move out. *Id.* § 1472(c)(5)(G)(ii)(I) (App. A89). The relevant regulations make clear that by agreeing to this restriction, an owner cannot require a tenant to move out, other than for cause, until "the end of the remaining useful life of the project." 7 C.F.R. Pt. 1965, Subpart E (1997), Ex. A-4.

ELIHPA also provides one exception that, while narrow, is key to the outcome of this matter. If the FmHA makes a discretionary decision that there is no longer a need for the housing in the area where it is located, and that housing opportunities for minorities will not be adversely affected, the owner can prepay and leave the program with no strings attached, consistent with the terms of its contract and the contemporaneous regulations. 42 U.S.C. § 1472(c)(5)(G)(ii) (App. A89). Thus, the statute does not in all cases prohibit withdrawal from the program. Instead, the agency must accept an owner's request to prepay without restriction if the statutory conditions are satisfied when the request is made. [6]

C. Application of the Legislation

Following passage of ELIHPA, the FmHA denied applications submitted by various Petitioners requesting to prepay their mortgages without any restrictions. App. A129. Other Petitioners who decided to prepay were informed by the agency and others that, based on then-existing market conditions in the area of their properties, any prepayment request would be denied under the requirements of the new statute, and that submitting a request therefore would be

---

[6] The prepayment restrictions imposed by ELIHPA on pre-1979 contracts, which were only "interim" in nature (*see* ELIHPA § 202(a)(9),(10)), were made permanent – and extended to post-1979 contracts – by another statute which was passed on October 28, 1992. Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992).

futile. *Id.* Thus, none of the Petitioners was able, at the time it desired to exercise its termination option, to satisfy the statutory conditions for prepaying without restrictions. Consequently, Petitioners remain stranded in the Section 515 program and subject to its severe income restrictions to this day, and likely will remain stranded until their fifty-year mortgage terms expire, despite their express desire to prepay and convert to market rents as soon as their personal circumstances and market conditions would allow.

Petitioners filed suit in the Court of Federal Claims in 1997 (*Franconia*) and 1998 (*Grass Valley*) asserting two counts: (1) a contract claim alleging that ELIHPA constituted an anticipatory repudiation of their option to prepay their mortgages at any time, and (2) a taking claim alleging that the legislation, as applied to their properties, effected takings of their real property interests. App. A132. To date, no discovery has taken place on any of Petitioners' claims.

III. Proceedings Below

A. Proceedings Before the Court of Federal Claims

The Court of Federal Claims issued its decision in *Franconia Associates v. United States* on May 6, 1999, in which it granted the government's motion to dismiss Petitioners' contract claims on limitations grounds. The court held that ELIHPA constituted an immediate breach of Petitioners' contracts, rather than an anticipatory repudiation, and that their contract claims thus accrued on the date that the agency issued regulations implementing the statute. App. A28-29. To reach this conclusion, the court found that the prepayment clause of Petitioners' contracts imposed no duty of performance on the government whatsoever:

> A careful reading of this clause reveals that no performance by the government is required - it is merely a promise to *allow* the borrower to prepay at any time during the life of the loan (emph. added).

App. A31; *see also* A32 ("[T]here was no performance due by the government under the contract."). The court concluded that the contracts imposed on the government nothing more than a continuing obligation to "keep its promise," and thus the contracts were breached when the government ceased keeping its promise by changing the law. *Id.*

Although the government did not move to dismiss Petitioners' taking claims, and although there had been no discovery or briefing with respect to those claims, the trial court went on to dismiss Petitioners' taking claims *sua sponte*, finding that those claims accrued on the same date as the contract claims. Without any citation to the pleadings, the court characterized plaintiffs' allegations as asserting that a taking occurred when the government "passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay." App. A24. Thus, the court deemed Petitioners' taking claims to allege solely a "facial" taking of their contractual right to prepay, which the court determined would have accrued upon the passage of the legislation (or, as the court held, upon issuance of the implementing regulations).[7] App. A34.

Following *Franconia*, the Court of Federal Claims issued a nearly identical decision on the contract claims of the Petitioners in *Grass Valley Terrace v. United States* on April 12, 2000. The *Grass Valley* court agreed with the *Franconia* court that the only performance due by the government under the prepayment clause was "to keep its promise to *allow* borrowers an unfettered prepayment right." App. A56; *see*

---

[7] Petitioners sought reconsideration of the court's opinion on a number of grounds, including the fact that the court had mistakenly assumed that none of the Petitioners had requested to prepay. As an example, Petitioners submitted a declaration from Petitioner Phoebe Perri in which she detailed her attempts to prepay and the FmHA's denial of her request. App. A157-58. Because there has been no discovery on the subject claims, Ms. Perri's declaration stands as the only evidence in the record on appeal concerning Petitioners' efforts to prepay. The court acknowledged that it had misstated the facts, but denied the motion. *See* 44 Fed. Cl. 315 (1999).

also id. at 55 (rejecting argument that the contracts obligated the government "to *accept* prepayment") (emphases added). However, unlike the *Franconia* court, the *Grass Valley* court dismissed only those claims on which the government had moved, *i.e.*, Petitioners' contract claims.

B. Proceedings Before the Federal Circuit

Upon appeal from the trial court's decision in *Franconia*, the Federal Circuit affirmed, holding that ELIHPA immediately "eliminated" and "took away" Petitioners' contract rights. App. A10, A14. The court concluded that any breach occurred on the day that the statute was enacted (rather than when the regulations were issued, as the trial court held). *Id.* A10. The Federal Circuit also adopted the trial court's reasoning that "the note's prepayment provision did not require any performance on the part of the government" and that the government thus had no more than an intransitive duty "to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.*

The court then disposed of Petitioners' taking claims, seemingly as an after-thought to its holding on the contract claims. The court defined Petitioners' taking claims – contrary to their allegations and arguments – as asserting solely a taking of their "unfettered right to prepay." *Id.* A14. By setting Petitioners' claims up in this manner, the court was driven to the conclusion that, because this right "was eliminated by the government with the passage of ELIHPA," Petitioners' taking claims accrued upon enactment of the statute. *Id.* In so holding, the court made no mention of the fact that the statute vests the agency with authority to grant prepayment requests in certain circumstances.

Petitioners sought rehearing in *Franconia*, based in part on the Federal Circuit's prior opinion in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). In *Greenbrier*, the court applied the precedent of this Court to hold that the taking claims of owners under a materially identical housing

program accrued, not upon the enactment of ELIHPA, but at the later date when the agency rendered a final decision on a prepayment request from each owner. The court denied the petition for rehearing on June 12, 2001. App. A70.

Following the issuance of the Federal Circuit's decision in *Franconia*, but before it denied rehearing in that case, the court issued a *per curium* decision in *Grass Valley* in which it affirmed the dismissal of Petitioners' contract claims on statute of limitations grounds. App. A15. Although no written opinion accompanied the order, the court's decision evidently was based on its holding in *Franconia*.

REASONS FOR GRANTING THE PETITION

This case presents significant legal issues concerning when contract and taking claims against the federal government accrue for purposes of the statute of limitations set forth in the Tucker Act, 28 U.S.C. § 2501. This Court has recognized that cases presenting limitations issues are important because of the fairness and judicial efficiency policies they present.[8] In this case, however, the Federal Circuit applied the statute of limitations in a manner that raises deeper concerns of fairness and gross judicial inefficiency. This case also impacts a large class of regulated parties and government contractors.

The decision below squarely conflicts with the firmly established precedent of this Court in both contract and takings cases, thereby upsetting settled expectations and creating confusion in the law. This confusion may lead other claimants to file suit prematurely to avoid dismissal of their claims, imposing an unnecessary burden on the courts.

---

[8] *E.g., Lampf v. Gilbertson*, 501 U.S. 350, 357 (1991) ("[L]imitations periods in general promote important considerations of fairness."); *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980) (statutes of limitations "have long been respected as fundamental to a well-ordered judicial system"). For similar reasons, the Court has granted certiorari in many takings cases involving the ripeness doctrine. *See infra* at 24-25.

The decision also exempts the government from standard contract principles in a manner that permits claims against the government to be dismissed as time-barred, when in any other context the claims clearly would be deemed timely. By rendering otherwise valid contract rights unenforceable in this manner, the decision endangers the government's credibility as a reliable business partner. Finally, the decision threatens to extinguish the claims of hundreds, perhaps thousands, of Section 515 owners across the country,[9] and impacts countless other government contractors whose potential claims might be rendered time-barred under the Federal Circuit's unprecedented analysis.

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That The Legislation Constituted An Immediate Breach Of Petitioners' Prepayment Option.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("*Mobil*"); *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) ("*Winstar*").[10] As this Court held in

[9] In addition to Petitioners, there are hundreds of similarly-situated owners with claims now pending before the Court of Federal Claims. *E.g.*, *Adams v. United States*, No. 96-699C; *Atwood-Leisman v. United States*, No. 98-815C; *Allegra Villa v. United States*, No. 98-823C; *Bellas Domas v. United States*, No. 98-826C. There are also countless other Section 515 owners in the country who have not yet attempted to prepay but may decide to do so in the future, who now will be unable to assert any claim against the government should their requests to prepay be denied. *See* Belden & Wiener, HOUSING IN RURAL AMERICA 117 (1999) (reporting that by August 1979, the FmHA had issued 6,874 loans under the Section 515 program).

[10] *Accord Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of

Winstar, holding the government accountable to such standards is essential to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." 518 U.S. at 883. By contrast, a rule "expanding the Government's opportunities for contractual abrogation" would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The Federal Circuit's decision in this case directly creates that very danger, in that it rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely and heard on their merits.[11]

A. The Federal Circuit Improperly Held That The Government Can "Eliminate" The Contract Rights Of Its Business Partners By Passing Legislation.

The Federal Circuit held that Petitioners' contract claims accrued upon the enactment of ELIHPA because the statute immediately "took away," "eliminated," and "conclusively abolished" their contract rights. App. A10, A14. Thus, the court in effect held that the government breached the contracts by passing a law. But standard contract law principles, recognized by this Court to apply against the government, make clear that it was the agency with whom

sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there").

[11] Given the unique jurisdiction of the Court of Federal Claims and the Federal Circuit, this Court has recognized the need to review cases emanating from those courts even in the absence of a split among the Circuit Courts. In fact, the Court has in recent years granted certiorari in three government contract cases from the Federal Circuit, all involving questions of the extent to which the government is bound by standard contract law principles. *See Mobil*, 530 U.S. 604; *Winstar*, 518 U.S. 839; *Hercules Inc. v. United States*, 514 U.S. 1049 (1995); *see also Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993) (noting that the rules applied by the Federal Circuit are "a matter of special importance to the Nation").

Petitioners contracted, and not Congress, that breached the contracts. That breach occurred not when the applicable law changed, but rather when the FmHA enforced the new requirements against Petitioners by failing to accept their prepayment requests according to the terms of their contracts.

As the Ninth Circuit recently held, the government was not acting in its capacity as the sovereign when it enacted ELIHPA. *Kimberly Assoc. v. United States*, __ F.3d __, 2001 WL 930454, *4 (9th Cir. Aug. 17, 2001) (publication pending) (finding it "unquestionable" that "the government was not acting in a 'public and general' capacity" when it passed ELIHPA, which "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered"); *accord Adams v. United States*, 42 Fed. Cl. 463, 480 (1998) (sovereign acts defense inapplicable because ELIHPA "specifically targeted the termination options found in FmHA's contracts"). As a result, the government's repudiation of Petitioners' contracts should not be afforded any special status simply because it came in the form of legislation.[12] The Federal Circuit's contrary holding that the legislation eliminated Petitioners' contract rights *ipse dixit* reflects a significant departure from standard contract law principles expressly held by this Court to be applicable to the government.

[12] *See Mobil*, 530 U.S. at 619-20 (where sovereign acts defense not raised, government actions in passing legislation analyzed under standard contract principles: "the fact that [the government's] repudiation rested upon the enactment of a new statute makes no significant difference"); *Alaska Pulp Corp. v. United States*, 48 Fed. Cl. 655, 659 (2001) (rules applicable to a party's repudiation of a contract are "no different where the government as a party to the contract commits this same sin through subsequent legislation"). Here, as in *Mobil*, the government cannot rely on the sovereign acts doctrine, having failed to raise the argument below.

B. ELIHPA Constituted An Anticipatory Repudiation Of Petitioners' Prepayment Option, Which Did Not Start The Statute Of Limitations.

One basic principle of contract law is the doctrine of anticipatory repudiation, set forth in the Restatement (Second) of Contracts § 250. *See Mobil*, 530 U.S. at 608.[13] The Restatement explains that a "repudiation" is a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Id.* In response to such a statement of prospective nonperformance, the obligee may either sue for breach immediately or await the time that the obligor's performance under the contract comes due. Williston § 1337; *Roehm v. Horst*, 178 U.S. 1, 10 (1900) (finding it "reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done"). If the obligee elects to wait, the statute of limitations on a claim for breach does not commence to run until the time for performance arrives and the obligor actually fails to perform. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988); 1 Corman, LIMITATION OF ACTIONS § 7.2.1 (1991).[14]

This Court's decision in *Mobil* makes clear how the doctrine of anticipatory repudiation applies in the context of

[13] Few precepts of contract law are more firmly entrenched than the doctrine of anticipatory repudiation, which can be traced back to the landmark case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853). *See* Corbin, CONTRACTS §§ 959, 1053 (1964); Jaeger, WILLISTON ON CONTRACTS §§ 824, 1300 et seq., 2027B (3d ed. 1968) ('Williston"); 17A Am. Jur. 2d, Contracts, § 448 et seq. (1990); Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001).

[14] As Professor Corbin explains, this rule serves important policy goals:

> The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately. Corbin, CONTRACTS § 989 (1964).

legislation passed by Congress. There, the government was obligated under contracts with oil companies to approve oil exploration plans submitted by the companies, if proper, within thirty days after submission. 530 U.S. at 609-10. Subsequent legislation, however, placed conditions on that approval, making it impossible for the government to approve plans submitted by the companies within the promised time frame. *Id.* at 611-12; *see also Conoco Inc. v. United States*, 35 Fed. Cl. 309, 318 (1996).

The trial court found, based on these facts, that the legislation constituted an "anticipatory repudiation" of the contracts. *Conoco, Inc.*, 35 Fed. Cl. at 327. This Court agreed, holding that "the Government's communication of its intent to commit [a] breach amounted to a repudiation of the contracts." *Mobil*, 530 U.S. at 621, 619 ("[I]f legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement."). Thus, the legislation did not constitute an immediate failure to perform under the contracts, but rather a statement of the government's intent to breach the contracts in the future – a classic anticipatory repudiation.[15] This was true even though the legislation left no doubt that the government would not comply with its obligations under the contracts. *See id.* at 611-12, 618.[16]

This Court thus recognized the critical distinction between the *enactment* of legislation by Congress, which amounts to only an anticipatory repudiation of affected

[15] The Court's conclusion that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that the remedy of restitution was available to the contractors. *Id.* at 608.

[16] A "repudiation" is no different from an "anticipatory repudiation." *See* Restatement (Second) of Contracts § 250 ("repudiation" defined as a "statement . . . that the obligor will commit a breach"), *quoted in Mobil*, 530 U.S. at 608; Black's Law Dictionary 1306 (7th ed. 1999) ("repudiation" defined as "words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract").

contracts, and the later *implementation* of that legislation by the contracting agency, which can result in an actual breach. Other courts have reached the same conclusion, both before and after *Mobil* was decided. *See Schism v. United States*, 239 F.3d 1280, 1290 (Fed. Cir. 2001); *Far West Fed. Bank v. Office of Thrift Supervision*, 119 F.3d 1358, 1365 (9th Cir. 1997) (quoting Restatement § 253); *Stone Forrest Indus. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1993); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (legislation constituted a statement of "prospective nonperformance" and implementation by agency resulted in an actual breach); *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 183 (applying this Court's decision in *Winstar* to hold that "FIRREA was essentially a legally binding forecast of a future breach" and thus "falls well within the definition of an anticipatory repudiation.").

The Federal Circuit's holding that ELIHPA constituted an immediate breach of Petitioners' contracts cannot be squared with this precedent.[17] Just as the contracts in *Mobil* obligated the government to approve proper exploration plans submitted by the contractors, the contracts here obligated the FmHA to approve prepayment requests submitted by the owners. And just as the legislation in *Mobil* announced that the government would not approve exploration plans according to the terms of the contracts at issue, ELIHPA announced that the government would not approve prepayment requests in accordance with Petitioners' contracts. In both cases, the government's legislative act of placing extra-contractual conditions on its future obligations amounted to a repudiation of the contracts, which would ripen into an actual breach only when the time for performance by the agency arrives.

[17] Although *Mobil* was decided after this case was fully briefed to the Federal Circuit in *Franconia*, Petitioners notified the court of the decision pursuant to Fed. R. App. P. 28(j). The Federal Circuit, however, failed to discuss or even reference the case in its decision.

If this were a dispute between private parties, there would be no question as to how these principles apply. The law is clear that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the option-holder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender. *See Holm v. CalEnergy Co.*, 229 F.3d 1157, 2000 WL 975177 at *1-2 (9th Cir. 2000) (table case); *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 143 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); *Rossi v. Oristian*, 376 N.Y.S.2d 295, 297 (N.Y. App. Div. 1975) (a claim for breach of a stock option contract "which provides that plaintiff might exercise the option at any time, presents a situation where the statute of limitations does not commence to run until the person granted the option demands the stock").

This conclusion is mandated by the very nature of a contractual option, which vests the option-holder with the right to choose at which point during the promised period it wishes to exercise the option. A contrary rule allowing the limitations period to commence upon the defendant's repudiation "would permit the defendant to select the date of breach and thus rob the plaintiff of the value of his option." *Hermanowski*, 580 F. Supp. at 143; *see also Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964) (the "very privilege" for which an option holder bargains is "the assurance that he will have the entire option period in which to make his decision").

The result should be no different here. Petitioners' contracts granted them the option to prepay their mortgages at any time that they desired during their fifty-year mortgage terms. As a result, the statute of limitations on Petitioners' contract claims did not begin to run until each owner attempted to prepay and the government failed to perform by accepting each owner's tender of prepayment. The Federal Circuit's contrary holding that every Section 515

owner affected by ELIHPA was required to file suit within six years after enactment of the statute, regardless of whether they attempted or even desired to prepay during that window of time, improperly permitted the government, rather than Petitioners, to set the date of breach. In granting this power to the government, the court exempted it from standard principles of anticipatory repudiation.

C. The Federal Circuit Created Contract Rules Applicable Only To The Government In Holding That The FmHA Had No Affirmative Obligation To Accept Prepayment Requests Made By Owners.

The Federal Circuit attempted to avoid the force of this precedent by holding that the prepayment option of Petitioners' contracts imposed no performance obligation on the government, other than an amorphous duty to "continue to allow" owners to prepay. App. A10. The court found that, although Petitioners had the right to prepay their mortgages at any time, the government had no reciprocal duty to accept such prepayments when tendered by owners. *Id.* (finding that the "prepayment provision did not require any performance on the part of the government"). By thus relieving the government of any performance under the contracts, the court could hold that the statute of limitations on Petitioners' contract claims accrued when the government, by passing ELIHPA, ceased keeping its promise to "continue to allow" owners to prepay.

The court's analysis of the parties' respective obligations under the contracts is difficult to understand and harder to justify. Indeed, The terms of the contracts, the governing statutes and regulations, and the applicable case law all make clear what would go without saying if this were a dispute between private parties: that the government had not only a duty to *allow* owners to prepay, but also an affirmative duty to *accept* prepayment requests when made by owners.

Petitioners' contracts state that prepayments "may *be made* at any time" (emphasis added). This clause necessarily encompasses both a right on the part of owners to submit prepayment requests *and* a reciprocal obligation on the part of the government to accept such requests when made. Any other interpretation would render the contracts illusory: absent a government obligation to accept prepayment, the owners' contractual right to prepay would be meaningless. *Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory"); *see also Winstar*, 518 U.S. at 921 (Scalia, J., concurring) (government contracts should not be read in a manner that renders government obligations "illusory").

The statutes and regulations governing the Section 515 program confirm that the government holds an obligation to accept prepayment requests made by owners and thereupon return the owners' security (*i.e.*, the property). Both before and after ELIHPA was enacted, the government uniformly recognized its obligation to "accept" prepayment requests.[18] The regulations in effect when Petitioners entered into their contracts also illustrate that the government's duty entails, not only an obligation to accept the owner's tender of prepayment, but also to complete a litany of tasks necessary to process the final payment, release the security, and permit the owner to exit the program.[19] None of these provisions

---

[18] *See* Pub. L. No. 96-153, § 503(b), 93 Stat. 1134 (1979), *codified at* 42 U.S.C. § 1472(c)(1),(2) (describing when Secretary "may not *accept* an offer to prepay" and when Secretary "shall *accept* such offer"); 42 U.S.C. § 1472(c)(4)(A),(5)(A) (setting forth agency procedures "before *accepting* any offer to prepay," when agency "may *accept* the offer to prepay," and when it "may not *accept*" any such offer); 7 C.F.R. § 1965.90(b) (1987) (outlining when agency "will *accept* prepayment" and describing agency procedures "upon *acceptance* of the offer to prepay") (emphases added).

[19] 7 C.F.R. § 1965.90(e) (1983) (outlining procedures for final payment and release); *id.* § 1866.2 (1983) (authorizing County Supervisor to execute the necessary releases to return the security to the borrower); *id.* § 1866.3

would make any sense unless the government actually was obligated to "accept" prepayment offers from owners.[20]

Finally, the court's holding that the prepayment clause "did not require any performance on the part of the government" yet again defies ordinary contract principles. Cases involving contractual option provisions consistently hold that once an option-holder exercises its option, the other party has a duty to perform by accepting the tender. *Holm*, 2000 WL 975177 at *1 ("obligation" to sell stock arose when option-holder "tendered the option price"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 (N.D.N.Y. 1998) ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform") (citing 4 Corbin, CONTRACTS § 264 (1951)); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 309 (S.D.N.Y. 2001) (option-holder "has sole power to decide when (or if) the optionor must perform"). Here, too, the government was obligated to perform by accepting prepayment if and when each owner tendered a prepayment request, and then releasing the security held by the government.

By finding that the contracts obligated the government to do no more than simply "continue to allow" owners to prepay, the court was able to hold that the only promise the government made under the contracts was to keep its promise. *See* App. A10; *see also id.* at A31. This reasoning, if generally applied, would write the doctrine of anticipatory repudiation out of the law, in that any statement by a party

---

(1983) (detailing procedures for the county office to follow in handling final payment and delivering of documents to the borrower).

[20] In fact, the Federal Circuit held in *Greenbrier*, with respect to the sections of ELIHPA applicable to HUD, that the statute does not *disallow* owners from prepaying, but rather imposes conditions on the agency's ability to *accept* requests to prepay. 193 F.3d at 1357 (holding that "neither statute denies an owner the ability to prepay its mortgage loan; rather, both statutes provide that an owner may prepay, albeit in accordance with a plan of action approved by the Secretary").

of its intention not to perform under a contract could be converted into a breach of the duty to "keep the promise,"[21] so that the statute of limitations would begin to run immediately when the statement is made. Fortunately, the law of anticipatory repudiation avoids such absurd results by providing that the limitations period commences only when the repudiating party actually fails to perform. *See supra* at 17, 20.

II. The Federal Circuit Defied This Court's Precedent By Holding That Petitioners' Taking Claims Accrued Upon The Enactment Of Legislation That Expressly Left Open The Possibility That Petitioners Would Be Permitted To Use Their Properties As They Desired.

A. The Legislation At Issue Demands An "As Applied" Takings Analysis.

This Court has long held that a taking claim based on a statute or regulation that allows for a discretionary agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2458 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-39 (1997); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Thus, where federal legislation regulates the use of property but provides an escape hatch permitting the agency to exempt certain property from its requirements, a takings claim is not ripe until the agency applies the legislation to the property in question. Otherwise, the agency's exercise of the discretion afforded to it under the statute to determine

[21] Indeed, the notion of a promise not to repudiate is merely a legal fiction, since no such promise is ever expressly made. *See* 5 Corbin, CONTRACTS § 1053 (1964) ("A forbearance to repudiate is never specifically promised."). Remarkably, the Federal Circuit converted this legal fiction into the government's only duty under the contracts.

whether the owner will be permitted to use the property as desired would be undermined.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981), for example, owners of coal mining lands alleged that the "mere enactment" of the Surface Mining Control and Reclamation Act effected a taking of their properties. Noting that the statute did not "categorically prohibit" the owner's intended use of the property, the Court held that the owners' taking claim was unripe. *Id.* at 297. The Court added that its holding did not preclude the owners from arguing that the statute "as applied" to their property resulted in a taking. *Id.* at 297 n.40; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (holding that the government's assertion of jurisdiction over wetlands did not in and of itself amount to a taking because under the permitting scheme created, "permission may be granted, leaving the landowner free to use the property as desired").[22]

The application of this precedent to the statute at issue is clear-cut. ELIHPA provides that prepayment requests may be accepted without any restrictions when the Secretary of Agriculture "determines that housing opportunities of minorities will not be materially affected as a result of the prepayment" and that "there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement." 42

[22] The Courts of Appeal uniformly have recognized these principles and applied them in a variety of contexts. *See, e.g., Gulf Power Co. v. FCC*, 208 F.3d 1263, 1271-72 (11th Cir. 2000); *Gilbert v. Cambridge*, 932 F.2d 51, 55-57 (1st Cir. 1991) (claim unripe where scheme created by ordinance left open possibility "that landlords may be granted leave to use their property as they wish"); *cf. National Adver. Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (taking claim accrued upon enactment of ordnance that demanded "immediate compliance without exception").

U.S.C. § 1472(c)(5)(G)(ii) (App. A89). If the Secretary makes these determinations in his or her discretion, the restrictions imposed by ELIHPA do not apply and the owner will be permitted to terminate its participation in the program.[23]

Thus, there can be no doubt, under the clear precedent of this Court, that Petitioners' taking claims did *not* accrue upon the "mere enactment" of ELIHPA. Because the legislation grants FmHA the discretion to grant prepayment requests without restrictions and thereby permit owners to use their properties as they desire in certain circumstances, Petitioners' taking claims present "as-applied" takings that could become ripe for review only upon implementation of the new requirements by the agency. As such, Petitioners' taking claims did not accrue until that time.[24]

Remarkably, the Federal Circuit recognized as much in a recent case involving a similar housing program that was impacted by a different section of ELIHPA. In *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), owners of low-income housing regulated by the Department of Housing

---

[23] Regulations issued under the statute similarly provide that "[i]n certain instances, prepayment may be approved" without any conditions imposed on the owner. 7 C.F.R. § 1965.215(c). In particular, "prepayment may be accepted without restrictions" where, among other things, "there is no longer a need for the housing." *Id.* § 1965.215(c)(3),(iii). App. A92-94.

[24] It nearly goes without saying that Petitioners' taking claims could not have *accrued* until they became *ripe* for review. *Levald, Inc. v. Palm Dessert*, 998 F.2d 680, 687 (9th Cir. 1993) ("Determining when the cause of action accrued is merely the corollary to the ripeness inquiry."); *Biddison v. Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991) (holding that "a taking claim accrues at the same time that it ripens"); *Norco Construction v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (holding that "the same considerations that render a claim premature prevent accrual of a claim for limitations purposes"); *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 182 (1997) ("For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution.").

and Urban Development ("HUD") challenged provisions of ELIHPA and a 1990 statute that restricted their right to prepay their mortgages. Observing that the legislation "expressly granted [HUD] authority to approve prepayment proposals" in some instances, the Federal Circuit held that the taking claims before it were unripe because none of the owners had alleged that they sought HUD's approval. *Id.* at 1358-59. Thus, while the Federal Circuit held that the taking claims of the HUD owners in *Greenbrier* were filed too early, it held that the materially indistinguishable taking claims of the FmHA owners in *Franconia* were filed too late. There is no basis for the Federal Circuit's decision to follow this Court's precedent in *Greenbrier* and then ignore it in *Franconia*.[25]

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims.

The Federal Circuit was able to ignore these firmly entrenched principles of takings law only by turning a blind eye to the terms of the statute. In particular, the court disregarded the provisions of the statute that permit FmHA to accept prepayment requests without restriction where it determines, among other things, that there is no longer a need for the housing. By reading this exception out of the terms of the statute, the court was able to treat Petitioners' claims as asserting only a facial taking. Had the court heeded the fact that the statute permits prepayment without restriction in some cases, it would have had no choice but to analyze Petitioners' taking claims on an as-applied basis.[26]

---

[25] The court did not discuss the *Greenbrier* decision or explain why its holding was not controlling in this case. The only similarity between the two cases is that the plaintiffs' claims were dismissed in both.

[26] While the court did not use the phrase "facial taking" *per se*, it held that the statute "took away and conclusively abolished" Petitioners' property interests upon its enactment. App. A14.

The Federal Circuit overlooked not only the terms of the statute and its own precedent, but also the substance of Petitioners' allegations. Petitioners alleged that the government's conduct effected a taking of their properties as of the date that Petitioners actually would have terminated their participation in the program but for the restrictions imposed by the legislation.[27] Thus, Petitioners alleged that the agency's *application* of the legislation, and not its mere *enactment*, effected a taking.

Moreover, even if Petitioners had not clearly alleged an as-applied taking of their properties, the Federal Circuit still would have been bound by the nature of the statute to employ an as-applied analysis. In cases where a facial taking claim is precluded by the fact that the statute does not categorically prohibit the owner's desired use of the property, the proper inquiry is whether the claim is ripe under an as-applied analysis. *See, e.g., Hodel*, 452 U.S. at 295-97 & n.40; *Pennell v. San Jose*, 485 U.S. 1, 9-10 (1988); *Greenbrier*, 193 F.3d at 1358-59 (rejecting facial taking claim and then proceeding to as-applied taking analysis); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 126-27 (1985). In this case, however, the Federal Circuit ignored the language of the statute, applied only a facial taking analysis, and concluded that the claims are time-barred.

The court's analysis is not saved by its characterization of Petitioners' claims as alleging a taking of their contractual prepayment right. App. A14. First, the notion that the property interest upon which Petitioners base their taking claim is an "unfettered right to prepay" finds no source in

---

[27] *See* App. A132, A155 ("As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use . . ."); App. A132, A154 (identifying the "date of Government performance" as "the date that each plaintiff would terminate its contract but for the Government's repudiation"); App. A157-58 (statement of Petitioner that she did not suffer any damages until the agency denied her request to prepay her mortgag

Petitioners' pleadings. Rather, the record makes clear that Petitioners, as title owners of the land and buildings at issue, assert a taking of their state-created real estate interests.[28] Second, as the Federal Circuit recognized in *Greenbrier*, 193 F.3d at 1356-59, even if Petitioners alleged solely a taking of their contract right to prepay, the possibility that prepayment requests may be accepted without restrictions in some cases precluded the court from limiting its inquiry to whether the enactment of the statute constituted a taking.

The Federal Circuit in effect held that Petitioners – and, by extension, every owner in the Section 515 program – should have filed their claims by February 1994 (six years after passage of ELIHPA), regardless of whether they had any intention of terminating their participation in the program by that time. The holding thus creates a new accrual standard for taking claims, providing that a statute can effect a taking before it has any impact on the use of the property at issue. As a result, the decision creates a conundrum for other property owners. Previously, owners like Petitioners would have been compelled by the precedent of this Court to refrain from filing suit until (1) they decided to terminate their participation in the program, and (2) the agency determined that the owner could not, at that time, meet the statutory requirements for doing so. Under the holding in *Franconia*, however, owners facing similar circumstances now will be forced to file suit prematurely in order to avoid dismissal of their claims for filing too late.[29]

---

[28] *See* App. A129, 151 (alleging that the government effected "a taking of plaintiffs' *properties* for public use" by, among other things, "requiring plaintiffs to house low-income tenants") (emphasis added). Petitioners' interests in their properties include the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties.

[29] Yet if they do so, they may face dismissal of their claims for filing too early, under the ripeness doctrine, based on *Greenbrier* and this Court's precedent – a veritable Catch-22. *See Bayou des Familles Development Corp.*

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government.

If permitted to stand, the Federal Circuit's holding will create unjust and unmanageable results for parties and the courts. Take for example a typical owner who entered into the program in 1979 and who, after twenty years, was financially able to prepay its mortgage in 1999. Assuming that the conditions for prepaying without restrictions could not be met at that time, the agency would deny the owner's prepayment request. If the owner then desired to file suit against the government for its failure to honor the terms of the contract, or for an improper taking, the owner would find that its claims had accrued eleven years earlier in 1988 and became time-barred five years earlier in 1994. The decision below thus would compel this owner to file suit by 1994, long before its taking claim became ripe, indeed, well before it even had any desire to exercise its prepayment option, and, consequently, before it suffered any actual damages. The law should not require such bizarre results.

CONCLUSION

This Court should grant certiorari in this case to determine, where the government attempts to modify its contracts through legislation, when the statute of limitations under the Tucker Act begins to run.

---

v. United States, 130 F.3d 1034, 1037-38 (Fed. Cir. 1997) (observing that the government "uses the ripeness doctrine as both a sword and a shield"). Indeed, if Petitioners had brought their taking claims immediately upon enactment of ELIHPA, the government undoubtedly would have challenged those claims as unripe, given the possibility of unrestricted prepayment under the statute. Surely, the Takings Clause should not be the subject of such gamesmanship. As this Court has stated, "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

September 10, 2001

Respectfully submitted,

Jeff H. Eckland
Counsel of Record
William L. Roberts
Mark J. Blando
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-766-7000

Attorneys for Petitioners

M2:20410624.02

APPENDIX

CONTENTS OF APPENDIX

Relevant Decisions and Orders

Decision of the Federal Circuit in *Franconia Associates v. United States* (Feb. 15, 2001) A1

Order of the Federal Circuit in *Grass Valley Terrace v. United States* (May 17, 2001) A15

Decision of the Court of Federal Claims in *Franconia Associates v. United States* (May 6, 1999) A17

Decision of the Court of Federal Claims in *Grass Valley Terrace v. United States* (April 12, 2000) A45

Order of the Federal Circuit Denying Rehearing in *Franconia Associates v. United States* (June 19, 2001) A69

Text of Relevant Legislation and Regulations

Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) A71

28 U.S. C. § 2501 (1994) A82

42 U.S.C. § 1472(c) (1994) A83

7 C.F.R. § 1965.215 (2000) A91

Pleadings Below

First Amended Complaint in *Franconia Associates v. United States* (June 25, 1997) A106

Complaint in *Grass Valley Terrace v. United States* (Sept. 15, 1998) A135

Other Materials

Declaration of P.J. Perri in *Franconia Associates v. United States* (May 18, 1999) (with exhibits).....A157

Loan Agreement for Pine Needle Apartments (Jan. 24, 1979).....A165

Promissory Note for Wishing Well Associates (Dec. 31, 1975).....A176

Real Estate Mortgage for Wishing Well Associates (Dec. 31, 1975).....A178

United States Court of Appeals for the Federal Circuit

99-5123

FRANCONIA ASSOCIATES, DAVID HODGES, SR. C/O HODGES DEVELOPMENT CORP., JOANNE M. HODGES, R.C. GETTY APARTMENTS, R.C. MO APARTMENTS, R.C. PIERRE APARTMENTS, R.C. SPRINGS APARTMENTS, SCENIC VALLEY ASSOCIATES, VALLEY ASSOCIATES, DUBLIN PLAZA, INC., EVERGREEN MANOR ASSOCIATES, FOX RIDGE PHASE II, MARILYN GRAHAM, GREENWAY OF ALTOONA ASSOCIATES, PHASE I, GREENWAY OF NEWTON ASSOCIATES, PHASE I, PHOEBE J. PERRI, PINE NEEDLES APARTMENTS, PRAIRIE VILLAGE OF ALTOONA ASSOCIATES, PRAIRIE VILLAGE OF GRIMES ASSOCIATES, PRAIRIE VILLAGE OF HUXLEY ASSOCIATES, PRAIRIE VILLAGE OF LAPORTE CITY ASSOCIATES, PRAIRIE VILLAGE OF SLATER ASSOCIATES, PRAIRIE VILLAGE OF STATE CENTER ASSOCIATES, TIMBERBROOK PROPERTIES and BRIAN E. WELLS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 15, 2001

Before MAYER, Chief Judge, NEWMANN, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

Appellants are owners of low income rental housing units financed by mortgage loans from the Farmers Home Administration of the United States Department of Agriculture ("FmHA").[1] The loans were made pursuant to section 515 of the National Housing Act of 1949, Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962) (codified as amended at 42 U.S.C. § 1485 (1994)) ("National Housing Act"), and provided funding for low income housing in rural areas. In exchange for a low interest mortgage loan, each of the appellants agreed to restrictions on the use of the property that was subject to the mortgage and on the investment return that could be enjoyed from the property. However, under their original agreements with FmHA, appellants had the option of prepaying their loans at any time, thereby ending the restrictions.

In 1988 and 1992, respectively, Congress enacted the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) (codified as amended in relevant part at 42 U.S.C. § 1472(c) (1988)) ("ELIHPA"), and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3681, 3841 (1992) (codified as amended in relevant part at 42 U.S.C. § 1472(c) (1994)) (the "1992 legislation"). On May 30, 1997, appellants filed suit in the United States Court of Federal Claims. In their complaint appellants alleged that, by restricting their ability to prepay their FmHA loans, ELIHPA and the 1992 legislation had constituted a breach of their contracts with FmHA and had amounted to a taking of their property, in violation of the Fifth Amendment to the Constitution.

[1] The agency formerly known as the Farmers Home Administration has undergone several name changes, and is now known as the Rural Housing Service. As used herein, the term "FmHA" includes the Farmers Home Administration and its successor agencies.

The government moved to dismiss appellants' breach of contract claims for lack of jurisdiction, asserting that the claims had accrued more than six years prior to the date the suit was filed and therefore were barred by the six year statute of limitations set forth in 28 U.S.C. § 2501 (1994). The Court of Federal Claims agreed and dismissed appellants' breach of contract claims. It also sua sponte dismissed their takings claims. Appellants appeal the dismissal of their suit. Because we conclude that appellants' causes of action accrued in 1988 when ELIHPA was enacted, which was more than six years before appellants filed suit, we affirm the Court of Federal Claims' dismissal of their action.

BACKGROUND

I.

Appellants' loans had terms of up to 50 years. In exchange for their loans, appellants promised to accept only eligible persons as tenants at their properties, to charge rents no higher than those permitted by FmHA regulations, to restrict the returns on their initial capital contributions, and to maintain certain cash reserves. Appellants all entered into loan agreements with FmHA prior to December 21, 1979[2]

Under the section 515 program, in addition to a loan agreement, each borrower's contract with FmHA was based upon a promissory note and a real estate mortgage. The note and mortgage were expressly referenced in the loan agreement. The note included an "escape hatch," whereby the owner could convert the property to market rate housing if the loan evidenced by the note was paid in full. Thus, each promissory note contained the following provision:

[2] Some of the plaintiffs before the Court of Federal Claims entered into loan agreements after December 21, 1979. Those claims remain before that court. Only the pre-December 21, 1979 contracts are at issue in this appeal.

"Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." This provision made it possible for appellants to prepay their loans at any time and then convert their property from low income to more profitable market-rate housing without first obtaining the permission of FmHA.

By the late 1970's many property owners had begun to exercise their prepayment options, thereby reducing the amount of available section 515 housing. In response, Congress passed the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, § 503, 93-Stat. 1134 (1979) (codified as amended in relevant part at 42 U.S.C. § 1472 (1982)) (the "1979 legislation"). The 1979 legislation, which amended the National Housing Act, prohibited FmHA from accepting prepayment of any section 515 loan made before or after the date of enactment of the statute unless the owner agreed to maintain the low income status of the housing for at least 15 years from the date of the loan. FmHA could waive this requirement only if it determined that the need for low income housing in the relevant area was satisfied.

Reaction to the 1979 legislation, however, persuaded Congress to further amend the National Housing Act in 1980 to eliminate the retroactive application of the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980) (codified as amended in relevant part at 42 U.S.C. §1472 (1994)), restored to pre-1979 section 515 borrowers, such as appellants, the right to prepay their mortgage loans at any time. The statute left the 1979 legislation's restrictions in place for loan transactions arising after the 1979 legislation.

Six years later, the continued short supply of low income housing prompted Congress to act again. Starting in October of 1986 and continuing through 1988, it enacted a series of moratoriums on loan prepayments. See H.R. Rep. No. 100-122(I) at 55 (1987), reprinted in 1987 U.S.C.C.A.N. 3317,

3369. Before the last moratorium expired, Congress passed ELIHPA, which was enacted February 5, 1988, to amend the National Housing Act to permanently maintain a steady supply of low income housing. ELIHPA contained multiple provisions affecting different programs that supplied low income housing to the public. Only Subtitle C of Title II, "Rural Rental Housing Displacement Prevention," pertains to appellants. § 241, 101 Stat 1886-90. The other provisions of Title II deal with Changes to Department of Housing and Urban Development ("HUD")-insured housing and other measures to preserve low income housing. Subtitle C imposes restrictions on prepayments of section 515 mortgages that originated before December 21, 1979. One restriction, codified in 42 U.S.C. § 1472(c)(4)(A) (1988), requires that before FmHA can accept a prepayment, it must "make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed." If, after this "reasonable period," no agreement has been entered into, FmHA must require the owner to sell the housing to a nonprofit organization or public agency for a fair market value. 42 U.S.C. § 1472(c)(5)(A)(i) (1988). Only if no offer to buy is made within 180 days may FmHA accept prepayment. 42 U.S.C. § 1472(c)(5)(A)(ii) (1988). ELIHPA placed "those owners of projects placed in service prior to 1979 on the same playing field as those post 1979 projects who are required by law to keep their units low-income for 20 years." H.R. Rep. No. 100-122(I) at 55, reprinted in 1987 U.S.C.C.A.N at 3371. The portion of ELIHPA that governed HUD-insured loans was temporary, with an express two year time limit. § 203, 101 Stat. 1878 ("Effective upon the expiration of the 2-year period beginning on the date of enactment of this Act – (1) subtitles B and D [dealing with HUD-insured loans] are repealed; and (2) each provision of

law amended by subtitle B or D is amended to read as it would without such amendment.").

Four years after ELIHPA, Congress passed the 1992 legislation. This legislation amended the National Housing Act to apply the prepayment restrictions of ELIHPA to section 515 loans made after December 21,1979. 42 U.S.C. § 1472(c)(4)(A) (1994).

II.

As noted above, appellants filed suit in the Court of Federal Claims on May 30, 1997. In Count One of their complaint, they asserted that the 1992 legislation "anticipatorily repudiated the contract between the defendant and each of the plaintiffs." According to appellants, the government's anticipatory repudiation had deprived, and would deprive, appellants of their right to prepay and terminate their loans at will. In Count Two of the complaint, appellants alleged that the repudiation of this contract right had amounted to a taking under the Fifth Amendment, for which they sought compensation.

In due course, the government moved to dismiss claims that involved pre-1979 loans, on the grounds that the statute of limitations had run as to those claims. The government maintained that it was ELIHPA that had affected the rights of the pre-1979 borrowers, not the 1992 legislation. The government argued that when the 1988 legislation was enacted, no other event needed to occur in order for the pre-1979 owners to bring suit. The 1992 legislation, according to the government, did nothing to alter the contracts of the pre-1979 borrowers.

Appellants countered with a motion for summary judgment on their breach of contract claims, asking the court to rule that the 1992 legislation constituted an anticipatory repudiation of the prepayment option, a material term of the loan contracts. Because the government's performance

obligation under the contracts was to accept prepayment upon request by a borrower, appellants argued, the legislation was a repudiation by the government, a statement that it would not perform its future contractual obligations. According to appellants, under the doctrine of anticipatory repudiation the statute of limitations did not begin to run with the repudiation. Rather, appellants contended, they were entitled to defer suit until performance under their contracts was due or until they elected to treat the repudiation as a breach, neither of which, they argued, occurred in 1988.

The Court of Federal Claims granted the government's motion. In doing so, it held that appellants' breach of contract claims accrued upon the effective date of the regulations implementing ELIHPA, May 23, 1988. Franconia Assoc. v. United States; 43 Fed. Cl. 702, 709 (1999). Because appellants did not file suit until May of 1997, the court determined that their claims were barred by the six year statute of limitations set forth in 28 U.S.C. § 2501. The court accepted the government's contention that ELIHPA alone affected the pre-1979 borrowers' contractual rights, rejecting the notion that, as far as appellants were concerned, it was only a temporary measure.

The court rejected appellants' anticipatory repudiation argument because it concluded that the 1988 legislation constituted an actual breach, not merely a repudiation, of the loan contracts. The court reasoned that the government's obligation under the contracts was not to accept prepayment upon request, but rather to allow the borrowers to prepay at any time. Under this reading of the contracts, once the government permanently prohibited prepayment through ELIHPA, no action on the part of the appellants was necessary for a breach of contract claim to accrue, the court determined.

Finally, although the government did not seek dismissal of appellants' takings claims in Count Two of the complaint,

the court sua sponte held that those claims too were barred by the six year statute of limitations. The court applied the same reasoning as it had applied to the breach of contract claims and found that the takings claims accrued on the effective date of the regulations implementing ELIHPA, May 23, 1988. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

I.

A suit against the government in the Court of Federal Claims is barred as untimely "unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). The six year statute of limitations acts as an "express limitation on the Tucker Act's waiver of sovereign immunity." Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1998). For purposes of the statute of limitations, a cause of action against the United States accrues "when all events have occurred which fix the government's liability." Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988) (quoting Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964)) (determining liability in a breach of contract claim); see also Seldovia Native Ass'n, Inc. v. United States, 144 F.3d 769, 774 (Fed. Cir. 1998) (determining liability in a takings claim).

In challenging the dismissal of their complaint, appellants make three arguments. First, they contend that the Court of Federal Claims erred because their causes of action did not accrue upon enactment of the 1988 statute. Rather, appellants assert, each borrowers cause of action could accrue only on the date on which FmHA refused a prepayment by the borrower, and ELIHPA did not constitute such a refusal. Appellants' first argument on appeal is premised upon the proposition that FmHA's obligation

under the loan contracts was to accept prepayment rather than allow prepayment, an obligation that could only be triggered by an attempt to prepay. Appellants argue that, under these circumstances, ELIHPA only amounted to an anticipatory repudiation of the government's obligation with respect to prepayment of the loan contracts. Consequently, each borrower had the option of either bringing suit based upon ELIHPA or of waiting until FmHA refused a prepayment request. Appellants' second argument is that even if the government's obligation under the loan contracts was to allow prepayment, it was not ELIHPA, but rather the 1992 legislation that breached that obligation, the reason being that the restrictions on prepayment contained in ELIHPA were only temporary. Third, appellants contend that the Court of Federal Claims erred in holding that their takings claims accrued at the same time as their breach of contract claims.

We are not persuaded by appellants' arguments; we hold that appellants' breach of contract and takings claims both accrued when ELIHPA was enacted on February 5, 1988. Therefore, the claims are time barred because suit was not brought until more than six years later, in May of 1997. We consider first appellants' breach of contract claims.

II.

A claim against the United States first accrues when the government's liability is determined. See Kinsey, 852 F.2d at 557. To determine whether, at some point, the government's liability with respect to appellants' breach of contract claims became "fixed," we first must determine the precise nature of FmHA's obligation under its loan contracts with appellants. As noted above, the contract provision that gave each appellant the right to prepay its loan from FmHA was contained in the promissory note evidencing the appellant's indebtedness: "Prepayments of scheduled installments, or

any portion thereof, may be made at any time at the option of the Borrower." This provision gave appellants an unfettered right to prepay their loans at any time. In addition, the note's prepayment provision did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan. Thus, under the original terms of the various loan contracts, appellants were allowed to prepay their indebtedness at any time. "[A] breach of contract is a failure to perform a contractual duty when it is due." Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). FmHA's contractual duty in this case was to continue to allow borrowers the unfettered right to prepay their loans at any time. If that continuing duty was breached, the breach occurred immediately upon enactment of ELIPHA because, by its terms, ELIPHA took away the borrowers' unfettered right of prepayment. We thus reject appellants' argument that their breach of contract claims could not accrue until they sought to prepay their loans.

Appellants are not aided by their anticipatory repudiation argument. "An anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future . . . . In such a situation, the normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation." Kinsey, 852 F.2d at 558. In other words, if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then appellants' claims did not accrue until some subsequent action by the government brought about an actual breach, although appellants had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts. The doctrine of anticipatory repudiation does not apply in this case, however, because, the enactment of ELIHPA constituted an

alleged breach, rather than just a repudiation, of the obligation to allow prepayment of the FmHA loans at any time. The government contracted to allow borrowers the unfettered right to prepay their loans and breached that promise, if at all, through the enactment of ELIHPA. The statute of limitations began to run at the time of breach, when ELIHPA was enacted on February 5, 1988.

Our holding today is consistent with our decision in Alder Terrace v. United States, 161 F.3d 1372 (Fed. Cir. 1998). The plaintiff in Alder Terrace entered into a contract with HUD to construct a housing project named "Alder Terrace." The contract was pursuant to section 221(d)(3) of the National Housing Act, 12 U.S.C. §§ 1715l(d)(3), 1715z-1. To finance the project, the plaintiff incurred indebtedness to a private lender that was represented by a promissory note, the repayment of which was insured by HUD. The note generally provided that it could not be prepaid prior to its final maturity date without the approval of HUD. However an additional provision of the note gave the plaintiff the right to prepay its indebtedness without HUD's approval anytime after 20 years from the date on which HUD finally endorsed the note for purposes of insurance. HUD endorsed the plaintiff's note on January 5, 1969. Thus, the plaintiff was entitled to prepay the note anytime after January 5, 1989.

On August 13, 1996, the plaintiff filed suit in the Court of Federal Claims. In its action it alleged that provisions of ELIHPA that placed restrictions on its ability to prepay its indebtedness breached its prior agreement entitling it to prepay its HUD-insured loan after 20 years. Alternatively, the plaintiff claimed that the enactment of ELIHPA constituted a taking of its property, entitling it to compensation under the Takings Clause of the Fifth Amendment. The Court of Federal Claims dismissed the complaint for lack of jurisdiction on the ground that the plaintiff's action was barred by the six-year statute of limitations. On appeal, we affirmed. Starting from the

premise that the plaintiff's suit was barred unless its cause of action accrued after August 13, 1990, we held that the suit was barred because both the date of ELIHPA's enactment (February 5, 1988) and the twenty-year prepayment date (January 5, 1989), the first date upon which the plaintiff was prevented from prepaying, occurred prior to August 13, 1990. We held that the claim accrued at the later of 20 years from contract origination or the enactment of ELIHPA. Id. at 1377. In other words, ELIHPA constituted a breach of contract by the government only if the plaintiff had an unfettered prepayment right when ELIHPA was enacted. Similarly, in this case appellants' claims accrued at the later of when appellants were eligible to prepay or the enactment of ELIHPA. Here, appellants had unrestricted prepayment rights from the dates of their loans. Thus, the enactment of ELIHPA was the only event that prevented appellants from exercising their express contractual rights to prepay. See also Adriadne Fin. Serv. v. United States, 133 F.3d 874, 879 (Fed. Cir. 1998) ("The government's liability was fixed when it refused to allow use of the asset it promised.").[3]

III.

Appellants' alternative argument that it was the 1992 legislation, rather than ELIHPA, that caused their breach of contract claims to accrue is unavailing. As discussed above, the government's alleged breach occurred when ELIPHA prohibited FmHA from allowing prepayments. In other words, the government breached its duty to appellants, if at

[3] The Court of Federal Claims held that the government breached its obligation, if at all, on May 23, 1988, the effective date of regulations implementing ELIHPA. However, we find that any breach would have occurred earlier, with the enactment of ELIHPA on February 5, 1988. The statutory command of ELIHPA, not its regulations, eliminated the allowance of prepayments. See Alder Terrace, 161 F.3d at 1378 ("The fact that the final regulations had not yet been promulgated in no sense lessened the restrictions on the Developer's prepayment right.").

all, with the passing of ELIHPA in 1988. Appellants argue, however, that language in the statute prohibits the 1988 legislation from serving as the date of breach because the elimination of prepayment rights was only temporary. In the findings and purpose section of ELIHPA, Congress stated that "interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants." Pub. L. No. 101-242, § 202, 101 Stat. at 1878. However, while this language indicates that parts of ELIHPA were "interim measures," the section relating to FmHA loans was wholly permanent. In contrast, the restriction on HUD-insured mortgage prepayments did have a "sunset provision" pursuant to which the terms of ELIHPA applicable to HUD-insured loans were to expire after two years. Pub. L. No. 101-242, § 203, 101 Stat at 1878. There is no similar language to indicate that the restrictions on FmHA loan prepayments were anything but permanent as to pre-1979 borrowers.[4]

IV.

Finally, appellants argue that, even in the absence of anticipatory repudiation on the part of the government, they still have a valid takings claim. They contend that the application of the statute of limitations to a takings claim requires an analysis of evidence specific to each claim. According to appellants, in this case, a takings claim only becomes ripe for an individual owner when he either has

[4] The 1992 legislation impacted only post December 21, 1979 borrowers. The legislation required that the language of ELIPHA be modified to strike the words "before December 21, 1979," and substitute "prior to the date of enactment of the Department of Housing and Urban Development Reform Act of 1989." Pub. L. No. 102550, § 712, 106 Stat at 3841. This amendment only affected borrowers whose loan contracts were made after December 21, 1979, and before passage of the Reform Act of 1989. The 1992 legislation made those loan contracts subject to the same requirements of ELI PHA as the pre-December 21, 1979 loan contracts.

offered to prepay his mortgage loan and his offer has been rejected, or when he shows that such an attempt would be futile. Appellants contend that because the court did not analyze evidence specific to each claim, the court erred in dismissing all of the appellants' takings claims. We disagree. The Fifth Amendment of the United States Constitution ensures that the government cannot appropriate private property for public use without just compensation. The government's liability for a takings claim becomes fixed when the property at issue is taken. Seldovia, 144 F.3d at 774.

Contract rights are a form of property that may be appropriated by the government. United States Trust Co. of N.Y. v. N.J., 431 U.S. 1, 19 n.16 (1977); see also Greenbrier v. United States, 193 F.3d 1348, 1356 (Fed. Cir. 1999). Thus, each appellant's contract prepayment right can be property for Fifth Amendment purposes. The appellants' unfettered right to prepay their FmHA loans at any time was eliminated by the government with the passage of ELIHPA because ELIHPA prohibited FmHA from allowing unrestricted prepayments. The statute thus took away and conclusively abolished a material contract right. Because appellants brought this suit in May of 1997, more than six years after ELIHPA effected an appropriation of their contract right, their takings claims are barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims is

AFFIRMED.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

00-5094

GRASS VALLEY TERRACE, JEFFERSON COMMONS, MARGORIE W. KASSNER, EILEEN KOTHE, NRCB LIMITED PARTNERSHIP, PETERS, WILLIAMS & KUBOTA, PINE NEEDLE APARTMENTS LIMITED PARTNERSHIP, RIPON MANOR, RURAL COMMUNITY BUILDERS, BEATRICE SCHMIDTBAUER, RICHARD SCHMIDTBAUER, THE HIGHLANDS and WATERLOO GREEN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 98-CV-726

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36

Per Curiam (NEWMAN, Circuit Judge, ARCHER, Senior Circuit Judge, and BRYSON, Circuit Judge).

ENTERED BY ORDER OF THE COURT

DATED: MAY 17 2001 /s/
Jan Horbaly, Clerk

In the United States Court of Federal Claims

No. 97-381C

(Filed May 6, 1999)

* *

FRANCONIA ASSOCIATES, et al.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Emergency Low Income Housing Preservation Act (ELIHPA); statute of limitations; summary judgment; anticipatory repudiation; breach of contract; unmistakability doctrine.

* *

Jeff H. Eckland, Minneapolis, Minnesota, attorney of record for plaintiffs.

Mark L. Josephs, Washington, D.C., with whom was *Assistant Attorney General Frank W. Hunger,* for defendant.

OPINION

REGINALD W. GIBSON, *Senior Judge*:

INTRODUCTION

In this case, property owners who received low interest loans from the Farmers' Home Administration, in exchange for providing low-income rental housing in rural areas, have filed suit against the government alleging that the

government breached the loan agreements and, as a result, took their property without just compensation. These wrongs allegedly occurred when Congress passed legislation (i.e., 1988 and 1992) that made prepayment of their loans significantly more difficult, whereas their original loan agreements had granted borrowers an unfettered prepayment right allowing them to terminate the contracts *at any time*. The government responds that of the forty-three (43) contracts at issue, thirty-four (34) are barred by the statute of limitations. 28 U.S.C. § 2501. On the other hand, the plaintiffs seek summary judgment on their breach of contract claim.

FACTS

The thirty-one (31) plaintiffs here at bar have entered into loan agreements with the Farmers' Home Administration (FmHA), United States Department of Agriculture,[1] to provide rental housing for low- and moderate-income persons in rural areas. These agreements were made under the authorization of §§ 515 and 521 of the Housing Act of 1949, and all the agreements were entered into prior to December 15, 1989. 42 U.S.C. §§ 1485, 1490a. Under these contracts, the FmHA makes or insures loans to finance the construction of rural rental housing units in exchange for which property owners agree to restrictions on the use of their property. The use restrictions include: (i) to accept only low- or moderate-income persons as tenants; (ii) to charge no higher rents than those permitted by the FmHA; (iii) to restrict their investment returns to a fixed percentage

[1] The Secretary of Agriculture, pursuant to Congressional authorization in 1994, has established a successor agency to the Farmers Home Administration known as the Rural Housing and Community Development Services (RHCDS). In 1996, the RHCDS changed its name to Rural Housing Service (RHS). In this opinion, we will refer to the FmHA to include the Farmers Home Administration and its successor agencies.

of their initial capital contributions; and (iv) to maintain certain cash reserves. 7 C.F.R. §§ 1944.215. These restrictions apply only until the indebtedness under the promissory notes is satisfied. The contract to provide low-income housing is documented by a promissory note, a loan agreement, and a real estate mortgage.

The FmHA included the following provision in the promissory notes executed by the owners as part of the contracts: "*Prepayments* of scheduled installments, or any portion thereof, may be made *at any time* at the option of Borrower." Def.'s Mot. Dismiss App. at 4 (emphasis added). This generous prepayment provision was only applicable, however, to owners entering into agreements *before* December 21, 1979 (pre-1979 loans). Plaintiffs entering into loans *after* December 1979 (post-1979 loans) were required to maintain the low-income affordability of the housing for a 15- or 20-year period following the date of the loan, *after which they were allowed to prepay their loans*. Furthermore, promissory notes contained another provision, as follows: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Def's Mot. Dismiss App. at 4.

Two subsequent statutes, in 1988 and 1992, affected plaintiffs' loans. First, in 1988, Congress amended the Housing Act by passing the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Pub. L. No. 100-242, 101 Stat. 1815, 1877 (1988), codified as amended at 42 U.S.C. § 1472(c). As to pre-1979 loans, ELIHPA considerably restricted prepayment entitlement by adding limiting procedures for prepayment. Specifically, ELIHPA restricted the prepayment option by: (i) requiring the Secretary to make "reasonable efforts" to enter into an agreement with the borrower to extend the low income use of the housing for not less than a 20-year period starting from the date of the agreement; and (ii) if such an agreement cannot be entered

into, the Secretary shall *require* the borrower to sell the housing to a qualified nonprofit organization at a fair market value as determined by two independent appraisers. Pub. L. No. 100-242, § 241, 101 Stat. 1815, 1886 (1988) (prior to 1992 amendment). The purpose of the 1988 amendments was to place "those owners of projects placed in service prior to 1979 on the same playing field as those *post*-1979 projects who are *required* by law to keep their units low-income for 20 years." H.R. Rep. No. 100-122(1) at 55, *reprinted* in 1987 U.S.C.C.A.N. at 3317. In the "Findings" section of the 1988 legislation, Congress included this statement:

> [U]ntil the Congress can act on recommendations that will emerge from this review [a proposed major review of alternative responses to loss of affordable housing], *interim measures* are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

Pub. L. No. 100-242, § 202(a)(10), 101 Stat. at 1878 (1988) (emphasis added). Finally, the legislation also included a "sunset" provision which provided that subtitles B and D of the Act would be repealed on February 5, 1990. *Id.* at § 203(a). Subtitle B deals with prepayment of mortgages insured with the Department of Housing and Urban Development (HUD) under the National Housing Act, 12 U.S.C. § 1701 *et seq.*, and subtitle D deals with other prepayments not affecting those made on loans for low-income rural housing. 101 Stat. at 1878, 1890. Consequently, loans entered into with the FmHA are not subject to ELIHPA's sunset provision.

Several years later, in 1992, Congress enacted the Housing and Community Development Act of 1992. Pub. L. No. 102-550 § 712, 106 Stat. 3681, 3841 (1992) (codified in relevant part at 42 U.S.C. § 1472(c)). This Act amended the same section of the Housing Act, as was amended by the

1988 legislation, by extending the prepayment restrictions that had previously only applied to pre-1979 loans to all loans made *prior* to 1989. *Id.* Additionally, it allowed the Secretary to offer an additional incentive of allowing owners to receive rents in excess of those normally allowed to loan recipients in order to induce owners to enter into agreements extending the low-income use of the housing. 42 U.S.C. § 1472(c)(4)(B)(vi).

Plaintiffs initially filed this action on May 30, 1997, with an amended complaint filed on July 28, 1997. They allege two counts, to wit, breach of contract and a Fifth Amendment taking. For the breach of contract claim, they assert that the *1992 legislation* constituted an anticipatory repudiation of the contract between the government and each of the plaintiffs. Plaintiffs allege that the government's anticipatory repudiation constitutes a breach of their contracts "as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation." Compl. ¶ 51. On the taking claim, the plaintiffs claim that "defendant's conduct" constitutes a taking of their property, as of the date of government performance *required* by each contract. Compl. ¶ 54.

Subsequent to the filing of the complaint, the government filed a motion to dismiss the claims, based on *pre*-1979 loans, on the grounds that the statute of limitations has expired as to those claims. The government contends that it was ELIHPA, enacted in 1988, rather than the 1992 legislation, that affected prepayment rights on *pre*-1979 loan agreements, thus any breach of the pre-1979 loan agreements occurred on the *date of enactment* of ELIHPA, which was February 5, 1988. At that time, nothing else had to happen for plaintiffs holding *pre*-1979 loans to bring a breach of contract claim, thus plaintiffs' claims accrued at that date. Because the pre-1979 claims, here at bar, were not filed until

May 30, 1997, which is not within six years of accrual, those claims on this record are time barred.

Plaintiffs then filed a motion for partial summary judgment seeking a ruling from this court on their first count, breach of contract through anticipatory repudiation. Specifically, plaintiffs wish this court to rule that the prepayment options were a material contract term, the government could not subject this contract term to inconsistent regulation, and that the 1992 legislation constituted an anticipatory repudiation of the contract because it restricted an owner's future exercise of the prepayment option.

The task before this court is, first, to determine whether *pre*-1979 loanholders' contract claims must be dismissed from the suit because their actions are time-barred. Even if all pre-1979 contracts are dismissed, however, we must still determine whether, as to post-1979 contracts, the government, by legislation, breached such contracts.

DISCUSSION

A. MOTION TO DISMISS–STATUTE OF LIMITATIONS

The government seeks to dismiss the plaintiffs' claims on the grounds of lack of subject matter jurisdiction pursuant to the Rules of the Court of Federal Claims (RCFC) 12(b)(1) because their claims violate the statute of limitations. Suits against the United States are subject to a six-year statute of limitations. 28 U.S.C. § 2501. The six-year time bar on actions against the United States is "a jurisdictional requirement attached by Congress as a condition on the government's waiver of sovereign immunity." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). Because the statute of limitations affects this court's subject matter jurisdiction–rather than being an affirmative defense–the requirement is strictly construed and under no circumstances may it be waived by the court. *Laughlin v.*

United States, 22 Cl. Ct. 85, 99 (1990), *aff'd*, 975 F.2d 869 (Fed. Cir. 1992); *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 404 (1994). If the motion to dismiss for lack of subject matter jurisdiction challenges the truth of the jurisdictional *facts* in the complaint, the court may look beyond the pleadings to consider all available evidence in order to determine jurisdiction. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). Similarly, if the court has doubts regarding jurisdiction, it may look at all the evidence presented to satisfy itself regarding the jurisdictional facts. *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). Accordingly, mindful of plaintiffs' burden to establish the jurisdiction of this court as well as our own duty to ensure the legitimacy of our jurisdiction, we consider all the evidence presented for this court's consideration in evaluating the government's motion to dismiss.

To prove that their claim is not time-barred, plaintiffs must show that their claim first accrued within six years of the filing of the complaint. *LaMear v. United States*, 9 Cl. Ct. 562, 569 (1986), *aff'd*, 809 F.2d 789 (Fed. Cir. 1986). Under this threshold analysis, a claim first accrues when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland*, 855 F.2d at 1577. In other words, a claim has accrued when the last event transpires that gives plaintiffs a cause of action. For breach of contract claims, the claim generally accrues at the time of breach. *Brighton Village Associates v. United States*, 52 F.2d 1056, 1060 (Fed. Cir. 1995).

1. The Accrual

Plaintiffs allege that the government breached the loan agreements by enacting legislation that deprived them of the prepayment option as it was expressly promised in the contract. They describe the government's action in enacting the legislation as an anticipatory repudiation of the contract. Secondly, they allege that the government has taken their

property without just compensation, in violation of the Fifth Amendment, when it passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay the loan and to lease their property on the open market. According to plaintiffs, therefore, the time of accrual for *both* the breach and the takings claims occurs on the date government performance is required by the contract. Government performance, plaintiffs argue, occurs when the plaintiffs "would terminate its contract but for the Government's repudiation." Compl. ¶ 51. In other words, plaintiffs are arguing that the claims will accrue on a future speculative date when the property owners will seek to prepay, but because of the above legislation, the government will refuse the owners' proffered prepayment.

The government moves to dismiss both the breach and the takings causes of action as to those claims that are based on loans executed *before* December 21, 1979. Such claims, the government contends, are barred by the six-year statute of limitations. According to the government, ELIHPA, enacted in 1988, was *the* legislation that restricted the prepayment option for pre-1979 loans. Therefore, any breach of contract accrued in 1988. The government makes no contentions as to the actual accrual date of plaintiffs' takings claims. Therefore, we must determine for ourselves–because of our responsibility to ensure subject matter jurisdiction–whether the takings claim is time-barred. *See RHI Holdings, supra*, 142 F.3d at 1461.

Plaintiffs' first count, breach of contract, is defended against the running of the statute of limitations on the doctrine of anticipatory repudiation. Citing the *Winstar-Related* cases, plaintiffs claim that, under the law of anticipatory repudiation, the plaintiffs may choose to sue at the earlier of: i) the anticipatory repudiation, or ii) the breach. A plaintiff may postpone filing suit and not be penalized due to the running of the statute of limitations because the

limitations period will not begin to run until an actual breach has occurred. *Winstar-Related Cases*, 37 Fed. Cl. 174, 183 (1997). The anticipatory repudiation here at bar, according to plaintiffs, occurred in 1992, when the later legislation was passed. This, they claim, marks the *earliest* time at which their claim could have accrued. Thus, six years hence, i.e., in 1998, would not bar the 1997 complaint filed here. The earlier 1988 ELIHPA legislation, plaintiffs contend, was only an "interim" measure such that plaintiffs were reasonable in waiting for Congress to enact a permanent solution before filing suit. For this proposition, they rely on *Anaheim Gardens*, decided in this court, which stated that the 1988 legislation was merely a temporary measure such that property owners "would not have been unreasonable to have forborne litigation until after they had learned what sort of 'permanent solution' Congress would devise." *Anaheim Gardens v. United States*, 33 Fed. Cl. 773, 776 (1995). Under the doctrine of anticipatory repudiation, a prerequisite to a legal finding of *de jure* repudiation is a "positive, unconditional and unequivocal declaration of fixed purpose not to perform a contract in any event or at any time." *Dingley v. Older*, 117 U.S. 490, 502 (1986). According to plaintiffs the 1988 legislation did not contain the necessary unequivocal declaration of repudiation. On the other hand, the 1992 legislation was such of an unconditional and permanent nature as to be an anticipatory repudiation. Thus, according to plaintiffs, the 1992 legislation, and not the 1988 legislation, constitutes the anticipatory repudiation.

Although 1992 marks the earliest, according to plaintiffs, that they could have sued, the statute of limitations does not begin to run until performance by the government becomes due. Here, plaintiffs claim, there is no duty of performance by the government until the time an owner "intends to exercise its termination option." Pl.'s Mot. Summ. J. at 32-33. Thus, if an owner never exercises its option, the government's anticipatory repudiation will never ripen into

a breach of contract. It is unclear from the evidence before this court whether any plaintiffs have tried to exercise their prepayment right. Indeed, plaintiffs argue that an attempt to prepay is not required because it would be futile–given the statutes passed by Congress–and the law does not require a plaintiff to do that which is futile. Plaintiffs arguments can be summarized as asserting that the six-year statute of limitations period commences at the later of: (i) the anticipatory repudiation occurring through the 1992 legislation, or (ii) the date upon which plaintiffs, but for the government's repudiation, would have exercised their prepayment options. We take each of these contentions in turn, i.e., (i) whether the 1988 or the 1992 legislation constitutes a permanent repudiation, thus marking the earliest point at which the plaintiffs may sue, and (ii) whether, notwithstanding the legislative repudiation, the limitations period does not begin to run until plaintiffs request prepayment.

Plaintiffs' characterization of the 1988 legislation as "interim" is based upon the "Findings and Purpose" section of the legislation. Pub. L. No. 100-242, § 202, 101 Stat. at 1877 (1980). Finding 10 states as follows:

> [U]ntil the Congress can act on recommendations that will emerge from this review, *interim measures* are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

Id. at § 202(a)(10) (emphasis added). This statement, however, cannot be given the weight that plaintiffs ascribe to it. The general rule of statutory interpretation is that statutes, once enacted and "unless explicitly provided to the contrary ... continue in force until abrogated by subsequent action of the legislature." 2 *Sutherland Statutory Construction* § 34.01 (5th ed. 1984). For a statute to be abrogated there must be an

explicit repeal by later legislation, or an implied repeal by a later inconsistent provision, or, if the statute states conditions for repeal, the happening of the condition. *Id.* at § 34.02-34.03. Even if the words "interim measures" in the preamble to the 1988 statute were meant to characterize the duration of the legislation, rather than being an expression of the motivation behind the legislation, we must nevertheless accept the 1988 legislation as a fully-enforceable *de jure* statute until later repealed. Thus, the 1988 ELIHPA is a *permanent* repudiation because it is a "positive, unconditional and unequivocal declaration of fixed purpose" to restrict borrowers' ability to prepay their loans.

The permanent nature of the 1988 legislation as it affects prepayment of FmHA loans is also evidenced by contrasting the way it treats FmHA loans as opposed to HUD loans. The 1988 legislation provided a "sunset provision"[2] for that part of the legislation affecting the National Housing Act (i.e., HUD) loans. The sunset provision provides for the expiration of two subtitles, subtitles B and D of the Act, pertaining to HUD loans, after a two-year period from the legislation's enactment. Pub. L. No. 101-242 § 203(a) (1988). Subtitle C, entitled "Rural Rental Housing Displacement Prevention," was not included in this sunset provision. Because Congress has provided for the expiration of some sections of the Act but not others, we must conclude that Congress intended that those sections of the Act pertaining to the prepayment of rural housing loans be permanent legislation, at least until later legislation expressly repealed it.

This conclusion does *not* run contrary to our holding in *Anaheim Gardens.* In *Anaheim Gardens,* this court had concluded that "ELIHPA [the 1988 legislation] was enacted expressly as a temporary measure." 33 Fed. Cl. at 776. But in

---

[2] A sunset provision in a statute specifies a date upon which the statute expires. Congress must take positive steps to allow the law to continue in existence by a certain date or it will cease to exist. *Black's Law Dictionary* (6th ed. 1990).

that case, the court was analyzing loan agreements made with HUD, rather than the FmHA. As stated earlier, the 1988 Act provided for a sunset provision in which restrictions on prepayments for the HUD loans would expire in two years. As to HUD loans, the court opined that ELIHPA was a temporary measure, later mentioning that the two-year "moratorium on prepayments" gave Congress time to devise a more permanent solution. *Id.* Because the case before us involves FmHA loans to which the sunset provision did not apply, the *Anaheim Gardens* characterization of the 1988 legislation is inapplicable. In short, this is a different case.

We are also mindful that our conclusion runs somewhat contrary to the Congressional declaration in the "Findings and Purpose" section of the Act that "interim measures are needed." First, we note that Congress did provide for "interim" measures with regard to HUD loans. Those measures expired after a two-year period. The comment that "interim measures" are needed does not necessarily apply to all the measures that Congress enacted in the 1988 legislation. Second, the "Findings and Purpose" section is very similar to "Policy" sections in other legislation. Under canons of statutory construction, policy sections are not part of the substantive portion of the statute and "may not be used to create ambiguity." 1A *Sutherland Statutory Construction* § 20.12. Thus, to the extent that the characterization of "interim" can be applied to the FmHA loan provisions, this statement cannot change the substantive statute. As we have stated above, a statute is permanent until later expressly repealed. As of the time of the enactment of the 1988 legislation, the legislation was permanent, and the breach of contract, if any, occurred at that date, because the government's liability was fixed at that time.

For a more exact date as to when a claim accrued, we must consult the enacting regulations. *See Winstar-Related Cases,* 37 Fed. Cl. at 183-184 ("[u]ntil the actual

implementation [of the legislation], there occurred no invasion of a legal right.") The 1988 legislation required the issuance of "final regulations" to carry out its measures. 101 Stat. at 1889. Furthermore, the 1988 legislation required that these regulations be issued within 60 days of the enactment of the legislation, with the regulations to take effect no later than 45 days from the date of issuance. *Id.* To allow the agency to promulgate such regulations in this short time period without running afoul of the Administrative Procedure Act's requirements for notice and comment on proposed rules, Congress allowed the agency to promulgate "emergency" rules. *Id.* Pursuant to this authorization, the agency issued "interim" rules without notice and comment on April 22, 1988 (53 Fed. Reg. 13,244 (1988)), with an effective date of May 23, 1988. The FmHA solicited public comment on a proposed final rule (55 Fed. Reg. 29,601 (1990)), but it never promulgated a final rule. Plaintiffs seem to argue that the fact that the FmHA only issued interim "emergency basis" rules rather than "final regulations," strengthens its view that the 1988 legislation was itself "interim." That is not the case. As we have previously illustrated, the 1988 legislation was in fact permanent. It also authorized the FmHA to issue emergency regulations because it required the FmHA to promulgate the regulations within a short time of the legislation's enactment. The nature of the regulations does not reflect upon the permanence of the enacting statute. Finally, the FmHA was working on a "final rule" and permitted public comment on its proposed rule. From the above facts, we can state that the plaintiffs' claim for breach of contract, if there was a breach, accrued on May 23, 1988, when the FmHA's regulations, issued pursuant to the enacting legislation, became effective. At that date, the government's liability was then fixed such that plaintiffs could have immediately brought suit. Because this suit was not filed until May 30, 1997, it was not brought within six years of accrual. And we so hold.

2. Anticipatory Repudiation

Plaintiffs argue in the alternative that, notwithstanding which legislation constitutes repudiation, under the anticipatory repudiation doctrine, the statute of limitations does not begin to run, on this record, until the later time for performance under the contract. *Winstar-Related Cases*, 37 Fed. Cl. at 183. As correctly stated by plaintiffs, *when* there has been an anticipatory repudiation, a plaintiff may choose to sue at the *later* of: i) the anticipatory repudiation, or ii) the breach. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988). There, determining when the statute of limitations begins to run, however, depends on when a plaintiff chooses to sue. In such case, the time of accrual of a claim, "depends on whether the injured party chooses to treat the anticipatory repudiation as a present breach." Calvin W. Corman, *Limitation of Actions*, § 7.2.1 (1991). For instance, when a plaintiff sues after performance is due by the repudiating party, i.e., after the actual breach, the "statute of limitations commences to run from the time fixed for performance rather than from the earlier date of repudiation." *Id.* But if a plaintiff elects to treat the anticipatory repudiation as a breach, "the accrual date of the cause of action is accelerated from time of performance to the date of such election." *Id.* According to plaintiffs, the statute of limitations is not triggered until performance is due by the government, which plaintiffs contend is when an owner intends to exercise its termination option.

Although plaintiffs have correctly stated the law regarding the running of the statute of limitations in an anticipatory breach situation, we disagree with their characterization of the government's required performance. Plaintiffs argue that the performance required of the government under the prepayment option is to accept a borrower's prepayment. In fact, the performance required of the government under the prepayment option is *to allow*

landowners to prepay, meaning that an actual breach occurred at the time of the 1988 legislation rather than an anticipatory repudiation. In order to understand this conclusion, we must begin our analysis with the loan agreements at issue, focusing our attention on the prepayment option.

The prepayment option for pre-1979 loan agreements–the only agreements at issue in the government's motion to dismiss–is composed of a single sentence. This sentence reads: "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." Def.'s Mot. Dismiss App. at 4. A careful reading of this clause reveals that no performance by the government is required–it is merely a promise to allow the borrower to prepay at any time during the life of the loan. No conditions are attached to this promise. The government's performance, if it can be called that, is to keep its promise to allow borrowers an unfettered prepayment right. No further performance was required by the government under the terms of the prepayment clause. Thus the government's performance, in the pre-1979 loan agreements, extends *throughout* the life of the loan, because its promise endures for the life of the loan. In 1988, however, Congress enacted the legislation that withdrew this promise. As of 1988, therefore, borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures. This was clearly in contravention of the government's clear promise to allow an *unfettered* prepayment right. We also note that this conclusion is in full accordance with *Adams v. United States*, a decision in this court on similar facts that held that because ELIHPA barred the FmHA from allowing loanholders to prepay at any time–the performance required of the government–the statute of limitations began to run from the enactment of ELIHPA. 42 Fed. Cl. 463, 473-74 (1998) (Horn, J.). Consequently, a cause of action arose in 1988 for the breach of its promise.

Plaintiffs' contentions that the repudiating legislation constitutes merely an *anticipatory* repudiation of a contractual right are wrong. Anticipatory repudiation occurs when a promisor communicates to a promisee that he will commit a breach in the future. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988). As its name implies, *anticipatory* repudiation is made by a promisor *before* his performance is due under the contract. 11 Williston on Contracts § 1312 (3rd ed. 1978), citing *Gold Mining and Water Co. v. Swinerton*, 142 P.2d 22, 27 (Cal. 1943). From this definition, we see that on the facts at bar there is no anticipatory repudiation. The performance required of the government was to keep its promise to allow borrowers an *unfettered* prepayment right; and this promise extended throughout the life of the loan agreements. With the 1988 legislation, the government broke its promise, ending its performance under the contract. Thus, it could not have anticipatorily repudiated because there was no performance due by the government under the contract. The breach thus occurred at the time of the legislation.

The above explanation of the effect of the 1988 legislation on the pre-1979 loan agreements squares with this court's decisions regarding a similar HUD loan. Under the HUD program, property owners were contractually entitled to prepay their loans only after 20 years from the date of their loan agreement. In *Anaheim Gardens*, cited frequently by plaintiffs, this court found that the 1988 legislation breached the contract of HUD borrowers. 33 Fed Cl. at 776. The court found, however, that because the majority of the borrowers had not reached their 20-year anniversary date at the time the 1988 legislation was passed, they could not have suffered any damages. Not until "such date as a plaintiff *might have* exercised the contractual prepayment rights on which the proposed breach claim is based," could the borrowers have suffered damages, such that the last act had occurred to render the government liable. *Id.* Under this reasoning, the court found that the statute of limitations would begin as of

the date of enactment of the 1988 legislation or the 20-year anniversary date of the agreement, whichever was later. *Id.* at 777. The *Anaheim Gardens* decision is consistent with a theory of anticipatory repudiation. In *Anaheim Gardens*, the time for performance by the government when it must allow prepayment-simply had not yet arrived. The HUD borrowers were entitled to treat the 1988 legislation as an anticipatory repudiation because the government's performance was not yet due. Thus they could also have waited to sue for breach of contract when government performance did come due, on the 20-year anniversary date of their loan agreements. In the case at bar, the government had promised the borrowers a prepayment right throughout the life of the loan starting with the inception of the loan. At the time of the 1988 legislation, the government was allowing prepayment, i.e., it was performing its part of the bargain. When the 1988 legislation broke its promise, the repudiation was not anticipatory; rather, it was an actual breach of contract.

Plaintiffs' position also makes little logical sense. They contend that the statute of limitations does not run until plaintiffs attempt to prepay and the government declines the prepayment. Yet plaintiffs also argue that because attempting to prepay is futile-given the repudiating legislation-they are not obliged to prepay in order to bring suit. Plaintiffs cite a Third Circuit case stating that the law, "which is eminently practical, does not require the doing of a vain thing." The cited case, however, is distinguishable, because there the plaintiff filed suit upon the anticipatory repudiation and within the limitations period from that repudiation. *Abdallah v. Abdallah*, 359 F.2d 170, 175 (3d Cir. 1966). When the court used the above-quoted language, it was stating that there was no necessity for the plaintiff to actually induce a breach if he was filing a breach of contract claim based on the repudiation. *Id.* In the case at bar, plaintiffs are essentially arguing that the statute of limitations

has not begun to run, which logically would mean that their claim has *not accrued*. Under an anticipatory repudiation theory, the alleged breach of contract must arise either from an anticipatory repudiation, or an actual breach of contract. The plaintiffs have not alleged any facts indicating that they have sought prepayment and been refused–the acts which under their theory are necessary to constitute a breach of the prepayment provision. Thus if their theory of breach of contract is anticipatory repudiation, their claim must be based upon the 1988 legislative repudiation; it cannot be based upon a breach that has not in fact occurred. Because this claim was not filed until May of 1997, it was not filed within six-years of repudiation and is therefore barred.

3. Accrual of the Takings Claim

Neither party has argued or briefed the issue of whether plaintiffs' takings claims accrues at the same time as the breach of contract claim. This court, nevertheless, can *sua sponte* take up the issue of whether the takings claim also meets this court's statute of limitations. *Celentano v. United States*, 41 Fed. Cl. 596, 606-607 (1998). Indeed, it is our duty to ensure that we have subject matter jurisdiction over the claims before us. In the takings claim, plaintiffs allege that the "defendant's conduct" constitutes a taking of their property, as of the date of government performance required by each contract. There is only one instance of "defendant's conduct" at issue–Congress's change of the prepayment option. As this action is alleged to have constituted a taking, the claim would have accrued at the time of the 1988 legislation, which, as discussed above, was when Congress by law changed the plaintiffs' prepayment rights. The discussion above, relevant to the breach of contract claim, is equally applicable to the takings claim. Therefore, for the same reasons expressed above, this takings claim fails because it was not filed within this court's six-year statute of limitations.

B. SUMMARY JUDGMENT

Plaintiffs seek summary judgment pursuant to RCFC 56(c) which provides for judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." A "genuine dispute" is one in which a reasonable jury, or in this case, a reasonable judge, could return a judgment for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The burden is on the moving party both to show that there is no genuine dispute as to any material fact and that it would be entitled to a directed verdict at trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In reaching a decision on summary judgment, the court is not to weigh the evidence, nor make credibility assessments, nor seek the truth of the matter. *Anderson*, 477 U.S. at 255. Any doubt as to factual issues must be resolved in favor of the party opposing summary judgment to whom the benefit of all presumptions and inferences run. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Finally, summary disposition is appropriate if there is no genuine dispute over a *material* fact. *Anderson*, 477 U.S. at 248. A material fact is one that might affect the outcome of the suit under the governing substantive law. *Id.*

In a summary judgment motion, the moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Adickes*, 398 U.S. at 157. This burden may be discharged if the moving party demonstrates that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The role of the judge is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

Plaintiffs' partial summary judgment motion in the case at bar requests a judgment on the first count of their

complaint to the effect that the government breached its contracts with plaintiffs when it established regulatory measures inconsistent with a material term of the contracts. The regulations at issue deprive plaintiffs of their contractual right to prepay their indebtedness–thus terminating their contracts–before the expiration date of the 40- or 50-year contracts. In opposition to this motion, the government argues first that the prepayment provision of each contract was not a material term of the contract. Second, the government argues that the allegedly repudiating statute did not absolutely prohibit prepayment so that it does not constitute a breach of the contract. Finally, the government raises the unmistakability doctrine. Under this doctrine, which is a canon of contract construction, a governmental surrender of *sovereign* authority must be expressed in unmistakable terms in the contract. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). In the contracts at issue here, the government argues that because plaintiffs cannot show that the government unmistakably surrendered its right to alter the contract through future legislation, the government cannot be subjected to damages for breach of contract. In fact, contends the government, the contract here states just the opposite when the contract included the following provision:

> It is understood and agreed by Borrower that any loan made or insured by the Government will be administered subject to the limitations of the authorizing act of Congress and the related regulations ....

Def's Reply App. at 5. According to the government, Congress's amendment of the authorizing legislation was a contingency agreed upon in the contract, as reflected in the above-quoted language. Because future legislative changes were contemplated under the contract, the government

cannot be liable in damages for breach of contract because of the changes.

The government does not contest any of the material facts that are currently before us.[3] Therefore, we have only to settle the legal issues presented for our consideration. Moreover, if the government's contentions regarding the unmistakability doctrine are correct, i.e., in the loan agreements at issue, the United States government has not surrendered in unmistakable terms its sovereign right to later alter the agreement then the plaintiffs' summary judgment motion fails as a matter of law, *even if* there was a breach of contract through legislation. Therefore, we consider it more prudent to pass on the government's contentions regarding the application of the unmistakability doctrine first. If we find that this doctrine is inapplicable or that an unmistakable promise was made by the government that said contract will not be subject to future contrary legislation, we will then consider secondarily the other issues of law, including breach of contract, that must be addressed before we can resolve plaintiffs' summary judgment motion.

1. Applicability of the Unmistakability Doctrine

The unmistakability doctrine was summed up in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, in which the Supreme Court stated that "sovereign power...

---

[3] The only factual issue raised by the government centered around three plaintiffs–the government asserted that it could not find evidence of loan agreements entered into between the FmHA and these three plaintiffs. According to plaintiffs' counsel, the three plaintiffs had entered into pre-1979 loan agreements. Because we have already determined above that those plaintiffs who entered into pre-1979 loan agreements must be dismissed from this suit, the factual dispute over whether these plaintiffs did in fact enter into loan agreements–which the plaintiffs admit are pre-1979 loan agreements–is moot. This factual dispute is therefore not a genuine issue of material fact in plaintiffs' motion for partial summary judgment.

governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 477 U.S. 41, 52 (1986). In the absence of an unmistakable promise to the contrary, all "contractual arrangements, including those to which a sovereign itself is a party, 'remain *subject to* subsequent legislation' by the sovereign." *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)). The underlying presumption is that contracts with the government will be subject to later contrary legislation unless there is a clear promise otherwise in the contract itself.

The most recent expansive discussion of this doctrine was in the Supreme Court's opinion in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In *Winstar*, three savings and loans asserted a breach of contract resulting from Congress's enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Prior to FIRREA, the plaintiff savings and loans had an agreement with the government that granted them favorable accounting treatment if they acquired failing thrifts. *Id.* at 847-48. With the passage of FIRREA, the favorable accounting methods were eliminated. *Id.* at 856-58. As a result, two of the three plaintiffs in *Winstar* were seized and liquidated by the government, while the third plaintiff was forced to engage in a massive recapitalization to stay afloat. *Id.* at 858. They filed a claim for breach of contract asserting that the government, by passing FIRREA, had breached its contractual obligation to accord the thrifts favorable accounting treatment. *Id.*

The Supreme Court decision was, unfortunately, a plurality opinion–although seven justices agreed to the ultimate finding of government liability, there was no majority consensus on the reasoning behind the liability holding, including the scope of the unmistakability doctrine and whether it was applicable to the facts. Justice Souter wrote the plurality opinion of the court, joined by Justices

Stevens, and O'Connor, with Justice Breyer concurring. While holding that the government was liable for breach of contract, the plurality came to this conclusion by finding that the unmistakability doctrine was *inapplicable* to the facts before them because they read the contracts to include a provision shifting *the risk* of future legislation to the government. *Id.* at 880-81. Because these risk-shifting provisions did not prevent Congress from acting in its sovereign capacity to alter the terms of the contract but merely designated who would pay for the changes, the provisions did not implicate Congress's sovereign powers and thus the unmistakability doctrine was simply inapplicable to the contracts. *Id.* Thus, the four plurality justices believed that the unmistakability doctrine was inapplicable on the facts. On the other hand, Justices Scalia, Kennedy, and Thomas believed the doctrine was *applicable* and that an unmistakable promise that the contract would not be subject to later-arising legislation had been made by the government. *Id.* at 921. These three justices thus concurred *in the judgment* finding the government to be liable. Dissenting Justices Rehnquist and Ginsburg found the doctrine to be applicable but found that *no unmistakable promise* had been made, disagreeing with the ultimate judgment against the government. *Id.* at 924-37. Thus a total of five justices agreed on the applicability of the unmistakability doctrine to the facts.

To determine whether we should apply the doctrine to the case at bar, we rely on the fact that a *majority* of justices, five, in the *Winstar* case found the doctrine applicable, even though that holding did not produce the ultimate judgment in the case. The five justices that comprised the dissent and the concurring opinions believed that the plurality had misapplied precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at 919. The two dissenters, for instance, believed that the

plurality had essentially restricted the doctrine, contrary to precedent, to situations where plaintiffs either seek (i) injunctive relief to hold the government to its alleged surrender of sovereign authority, or (ii) damages which would be the "equivalent of" an injunction or exemption to a changed law. *Id.* at 926. The five justices agreed that courts could not make distinctions between claims in order to apply the unmistakability doctrine. *Id.* at 919, 926-27. Moreover, the five justices found the unmistakability doctrine applicable even if the contract included a risk-shifting clause as found by the plurality. As stated by the two dissenting justices, the unmistakability doctrine "has a role to play" in determining whether a risk-shifting term was in fact included in the contract. *Id.* at 930. They believed that the unmistakability doctrine was a canon of construction to be used in interpreting all governmental contracts. According to the five justices, the plurality inappropriately interpreted the contract without applying the presumption of the unmistakability doctrine when it determined that the doctrine itself was inapplicable. *Id.* at 920-21, 930.

Because a majority of the justices believed that the unmistakability doctrine must be used in interpreting all governmental contracts, we must understand that to be the controlling holding on the doctrine.[4] We will thus apply the unmistakability doctrine to the case at bar.

[4] The view of the five justices in *Winstar* on the unmistakability doctrine has also been adopted as controlling by the Federal Circuit. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1578-79 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998). After concluding that the unmistakability doctrine applied on the *Yankee Atomic* facts, the court stated that "this conclusion respects the view of the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts." *Id.*

2. Whether an Unmistakable Promise was Made

Under the unmistakability doctrine, we must first determine whether the contracts between the plaintiffs and the FmHA unmistakably preclude the government from subsequently exercising its sovereign power to alter prepayment rights. *See e.g., Yankee Atomic*, 112 F.3d at 1579. For the reasons outlined below, we hold that the FmHA loan agreements *do not* contain an unmistakable promise precluding the government from exercising its sovereign power to alter the prepayment rights.

The characteristics that make a promise unmistakable have often been described, but such promises are rarely found by the courts. An unmistakable promise has been characterized as having terms that "admit of no other reasonable interpretation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Even an ambiguous term of a contract will not be construed as a conveyance or a surrender of sovereign power. *Winstar*, 518 U.S. at 878. An unmistakable promise was, however, found by the three concurring justices in *Winstar*. They found this promise in the nature of the contract. The reason for the contract, the essential quid pro quo, they argued, was that the government was to regulate supervisory goodwill favorably in exchange for the savings and loans' acquisition of the failing thrifts. *Winstar*, 515 U.S. at 921 (J. Scalia, concurring). Thus the contract itself was a promise to regulate favorably–to state that no unmistakable promise was made would be to render the contract an illusory promise. *Id.* (stating that "I do not accept that unmistakability demands that there be a further promise not to go back on the promise to accord favorable regulatory treatment.").

Under the facts of this case, there is no unmistakable language within the prepayment provision that waives the government's right to modify the prepayment terms through future legislation. It simply states that "[p]repayments of scheduled installments, or any portion thereof, may be made

at any time at the option of Borrower." Def.'s Mot. Dismiss App. at 4. Elsewhere in the loan agreement, however, is the following clause: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Def's Mot. Dismiss App. at 4, 9. This is the only clause in the agreement that addresses the effect of future acts on the terms of the agreement. But this clause only refers to future *regulations*, not statutes. Federal regulations stem from federal agencies, and the above clause specifically refers to regulations of the Farmers Home Administration. From the plain words of the contract, we must conclude that this clause protects the contract from subsequent changes by the Farmers Home Administration. We cannot conclude, however, that this protection extends to future changes in law by Congress. Indeed, under the unmistakability doctrine, such an expansion of a contractual clause is prohibited. *See also Parkridge Investors Ltd. v. Farmers Home Administration*, 13 F.3d 1192, 1198 (8th Cir. 1994), *cert. denied*, 511 U.S. 1142 (1994) (an exemption from future *regulations* does not exempt a contract from future acts of Congress). Thus, it cannot be read as an unmistakable promise by the government that it would not later change the terms of the agreement by future legislation.

There is also no unmistakable promise under the *Winstar* concurrence criteria. In the case at bar, the essence of the contract was for the borrower to receive a low-interest loan in exchange for agreeing to rent the property to low-income tenants. Although the prepayment provision was a material term of the contract–it is likely that some property owners might not have entered into the agreements had the prepayment terms been less generous–it was not the reason for the agreement. By definition, a prepayment provision is not going to be the purpose of a loan. Thus, the *Winstar* concurrence's criteria for an unmistakable promise are not met on the facts before us.

Because we find that there is no unmistakable promise by the government in the loan agreements to absolve the contract from further substantive legislation, the government has a defense to the claim that the government breached the loan agreements through subsequent legislation.[5] Therefore, plaintiffs' motion for partial, summary judgment is DENIED.

CONCLUSION

The government's motion to dismiss all claims, premised on breach of contract and takings, based on loans executed *before* December 21, 1979, is hereby GRANTED. Pursuant to RCFC 54(b), inasmuch as there appears to be no just reason for delay, the clerk shall dismiss the claims and enter judgment with respect to all claims based on loans executed *before* December 21, 1979.

Plaintiffs' motion for partial summary judgment on their claim for breach of contract is DENIED because of the unmistakability defense. Therefore, two counts (i.e., breach of contract and a taking) from plaintiffs' complaint remain for trial on the merits as to those plaintiffs whose claims are based on loans executed after December 21, 1979. To the extent that defendant has not filed an answer to any of the surviving claims, it shall do so within twenty (20) days from the date of this opinion. In addition, the parties shall file a joint memorandum within fourteen (14) days from the receipt of this opinion advising the court how they wish to

[5] We need not consider the other defenses raised by the government. These defenses are: (i) that the prepayment provision of each contract was not a material term of the contract; and (ii) that the allegedly repudiating statute did not absolutely prohibit prepayment so that it does not constitute a breach of the contract.

proceed regarding the remaining counts in each surviving claim.

IT IS SO ORDERED.

United States Court of Federal Claims.

GRASS VALLEY TERRACE, a California Limited Partnership, et al., Plaintiffs,

v.

The UNITED STATES, Defendant,

No. 98-726 C.

April 12, 2000.
Reissued for Publication: May 22, 2000.

Jeff H. Eckland, Minneapolis, MN, for plaintiff. William L. Roberts and Mark J. Blando, Minneapolis, MN, of counsel.

Mark L. Josephs, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant, with whom were David M. Cohen, Director, and David W. Ogden, Acting Assistant Attorney General.

OPINION

DAMICH, Judge.

I. Introduction

In this case, fourteen Plaintiffs, who entered into loan agreements with the Farmers Home Administration (FmHA), United States Department of Agriculture, to provide low-income rural housing, filed suit against the government alleging the government breached its contracts by enacting subsequent legislation that made it substantially more difficult for Plaintiffs to exercise their option to prepay their loans at any time. The Defendant filed a motion to dismiss on the ground that six of the Plaintiffs' claims are barred for lack of subject matter jurisdiction. Plaintiffs filed a motion

for partial summary judgment as to their breach of contract claims (Count I). Plaintiffs claim as damages the value of the increased rents that Plaintiffs believe they could have charged after prepayment, diminution in property value, and costs involved in continuing to comply with the FmHA housing program.

II. Facts

Fourteen Plaintiffs entered into loans with the FmHA to provide rental housing for low- and moderate-income individuals and families in rural areas. These loans were made pursuant to §§ 515 and 521 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485, 1490(a)). All the Plaintiffs entered into their contracts either before December 21, 1979 (pre-1979 contracts); or on or after December 21, 1979, but before December 15, 1989 (post-1979 contracts). The agreement to provide low-income housing consisted of a promissory note, a loan agreement, and a real estate mortgage.

In exchange for low-interest rates on their loans, Plaintiffs in the contracts agreed to numerous restrictions ("the investment return restrictions") on the use of their properties while their loans remained outstanding, including: (1) to accept only eligible low- or moderate-income persons as tenants; (2) to charge rents no higher than those permitted by FmHA; (3) to restrict investment returns to a rate of 8% on their capital contributions; and (4) to maintain certain cash reserves.

FmHA included the following express provisions in the promissory notes executed by the borrowers in the Section 515 program: (1) "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower" and (2) "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express

provisions hereof" or "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations and provisions hereof." For the pre-1979 Plaintiffs, the loan agreements, by their terms, including the investment return restrictions, continue only so long as the indebtedness under the promissory notes remains unsatisfied.

However, the contracts of Plaintiffs entering into loans with the FmHA on or after December 21, 1979 differed. Post-1979 Plaintiffs were required by the terms of the loan documents to maintain the low-income nature of the housing for a period of 15 or 20 years following the date of the loan.

III. The Legislation

A. Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)

On February 5, 1988, Congress amended the Housing Act by passing the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Pub.L. No. 100-242, 101 Stat. 1877 (1988), codified as amended at 42 U.S.C. § 1472(c) ("the 1988 legislation"). This legislation did not terminate the prepayment right of pre-1979 owners,[1] rather it placed a number of restrictions on the exercise of the prepayment option. For example, it required pre-1979 owners who made an offer to prepay, to negotiate an agreement with FmHA to extend the low-income use of their properties for a period of 20 years from the date of the agreement. 42 U.S.C. § 1472(c)(4)(A). In order to encourage owners to extend the low-income use of their properties, various incentives were offered such as increases in the rate of return on investment, reductions on the interest rate on the mortgage loan, additional rental assistance and an equity loan. 42 U.S.C. §

[1] The 1988 legislation did not address the post-1979 owners.

1472(c)(4)(B). If borrowers chose not to extend the low-income use of their properties, borrowers were required to sell the housing to a qualified non-profit organization or public agency at a fair market value as determined by two independent appraisers. 42 U.S.C. § 1472(c)(5)(A).

In order to avoid placing its property for sale, the borrower was required to extend the low-income use of its property for a period of time determined by the Secretary but not less than 20 years from the date of the loan origination. 42 U.S.C. § 1472(c)(5)(G). However, owners were still required to offer to sell the property to qualified non-profits at the end of that period. *Id.* On the other hand, if the Secretary determined that housing opportunities for minorities would not be materially affected as a result of the prepayment and that either (a) tenants would not be displaced; or (b) that there is an adequate supply of affordable rental housing within the market area of the housing, then the prepayment restriction did not apply. *Id.*

B. Housing and Community Development Act of 1992

On October 28, 1992, Congress enacted the Housing and Community Development Act of 1992. Pub.L. No. 102-550 § 712, 106 Stat. 3681, 3841 (1992) (codified in relevant part at 42 U.S.C. § 1472(c)). This legislation amended the 1988 legislation by extending the application of the prepayment provisions to FmHA loans made on or after December 21, 1979, but prior to the date of enactment of the Department of Housing and Urban Development Reform Act of 1989. 42 U.S.C. § 1472(c)(4)(B)(vi). Furthermore, the legislation permitted the Secretary to provide incentives to extend the low income use by allowing owners to receive rent in excess of the amount normally permitted by loan recipients. *Id.*

IV. Procedural History

Plaintiffs commenced this action on September 16, 1998. In Count I, Plaintiffs allege that by enacting the Housing and Community Development Act of 1992, the government anticipatorily repudiated its contract with each of the Plaintiffs. Plaintiffs allege that the anticipatory repudiation constitutes a breach of contract as of the date that each Plaintiff would terminate its contract but for the government's repudiation. In Count II, Plaintiffs claim that Defendant's conduct constitutes a taking of Plaintiffs' properties for public use and requires payment to Plaintiffs of just compensation under the Fifth Amendment to the United States Constitution.

Also on September 16, 1998, Plaintiffs filed a motion for class certification pursuant to Rule 23 of the Rules of the United States Court of Federal Claims. The motion was denied on June 9, 1999.

On January 20, 1999, Defendant filed a motion to dismiss certain of Plaintiffs' claims. Specifically, Defendant seeks the dismissal of breach of contract claims of 6 Plaintiffs holding only "pre-1979" loans, and a portion of the breach of contract claim of one Plaintiff holding one pre-1979 loan.[2] On March 18, 1999, Plaintiffs responded by filing a motion for partial summary judgment with respect to their breach of contract claim (Count I of the complaint) and an opposition to Defendant's motion to dismiss. Oral argument was held.

---

[2] On November 10, 1999, the parties filed a joint stipulation with regard to two parties added to this action in July 1999, Baltimore, Ltd. & ABCD Trust. The parties stipulated that Defendant's motion to dismiss and Plaintiffs' motion for partial summary judgment apply to all Plaintiffs, including the two Plaintiffs added after Defendant filed the motion to dismiss. As to the additional Plaintiffs, the parties agree that Baltimore, Ltd., is a post-1979 Plaintiff. The parties disagree as to whether ABCD Trust is a "pre-1979" or "post-1979" Plaintiff.

V. Discussion

A. Motion to Dismiss Certain Claims

1. Standard

Pursuant to Rule 12(b)(1) of the Court of Federal Claims, the Defendant moves to dismiss claims brought by six of the fourteen Plaintiffs for lack of subject matter jurisdiction because the claims violate the statute of limitations. The United States Court of Federal Claims is a court of limited jurisdiction. *Bath Iron Works Corp. v. United States*, 27 Fed.Cl. 114, 122, aff'd, 20 F.3d 1567 (Fed.Cir.1994); *Dynalectron Corp. v. United States*, 4 Cl.Ct. 424, 428, aff'd, 758 F.2d 665 (Fed.Cir.1984). The statute of limitations provides that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). If the motion to dismiss for lack of subject matter jurisdiction challenges the truth of the jurisdictional facts in the complaint, the court may look beyond the pleadings to consider all available evidence in order to determine jurisdiction. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed.Cir.1991). Because the statute of limitations is jurisdictional, "plaintiff bears the burden of proving that its action was timely filed." *McDonald v. United States*, 37 Fed.Cl. 110, 113 (1997).

2. Arguments

Defendant argues that the Plaintiffs' breach of contract claims based upon loans executed on or before December 21, 1979, are barred by the statute of limitations. The claims first accrued upon the enactment of ELIHPA on February 5, 1988, and the present action was filed on September 16, 1998, more than six years later. The Defendant contends that ELIHPA

immediately restricted the purported right of Plaintiffs to prepay their mortgages at any time. Therefore, if any breach occurred, it accrued in 1988.

In response, the Plaintiffs first argue that the limitations period does not commence to run upon enactment of the 1988 legislation because this legislation was only temporary. Plaintiffs claim the limitations period commences to run on the enactment of the 1992 legislation or the date on which Defendant, but for its repudiation, would have been required to accept the exercise of a termination option.

In support, Plaintiffs rely on finding (10) in the "Finding and Purpose" section of the legislation. Pub.L. No. 100-242, § 202, 101 Stat. 1815, 1878 (1988). The pertinent finding states, "[U]ntil the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants." *Id.*

Plaintiffs argue that the language calling for "interim measures" indicates that the provisions relating to FmHA loan holders were only temporary measures thus failing to give notice to Plaintiffs that their so-called "unfettered right" to prepay at any time was permanently altered. Further, Plaintiffs argue that because Congress set the HUD provisions in the 1988 legislation to expire after two years, it was therefore reasonable for the FmHA loan holders to question whether Congress would change the law regarding the pre-1979 contract prepayment provision.

3. Analysis

A claim first accrues for purposes of the statute of limitations when all events have occurred which fix alleged liability of defendant and entitle plaintiff to institute action. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988). A claim does not accrue unless the claimant knew or should have known that the claim existed.

Jones v. United States, 801 F.2d 1334, 1335 (Fed.Cir.1986). Whether a plaintiff should have been aware of the existence of a claim is an objective test in which "a plaintiff does not have to possess actual knowledge of all relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed.Cir.1995) (citing *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed.Cir.1984)).

[3] Plaintiffs incorrectly claim that the 1988 legislation affecting FmHA loans was temporary rather than permanent. First, Plaintiffs place greater emphasis on the "Findings and Purpose" section than is appropriate. The "Findings and Purpose section" is similar to a policy section or preamble. "The policy section like the preamble is available for the clarification of ambiguous provisions of the statute, but may not be used to create ambiguity." 2A Sutherland Stat. Const. § 20.12 (5th Ed.1992 Rev.). "The declaration of policy like the preamble is not part of the substantive portion of the statute." *Id.* It is well settled that "unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature." *Id.* at § 34.01. "A statute may contain a provision prescribing that it will cease to operate on the happening of a specified event or date." *Id.* Without such a provision, the general rule is that a statute continues in effect indefinitely. *Id.*

[4] The 1988 legislation contains a "sunset" provision in Section 203 which specifically states that two years after the date of enactment of the legislation subtitles B and D are repealed. Pub. Law No. 100-242, § 203, 101 Stat. 1878 (1988). The FmHA provisions at issue in the present case are contained in Subtitle C. There is no indication that the FmHA provisions contained in Subtitle C were temporary. On the contrary, the conference report on ELIHPA stated, "the Farmers Home Administration provisions are amendments to permanent law and are not subject to the sunset provisions in Subtitle A." H. Conf. Rep. No. 100-426, 100th Cong., 1st Sess. 199 (1987), reprinted in 1987 U.S.C.C.A.N. 3458, 3496.

Thus, the legislation contains clear express language providing for the termination of HUD but not FmHA provisions. This Court cannot do what Plaintiffs ask, that is, to use the "Findings and Purpose" section to create ambiguity where none exists. If this Court were to adopt Plaintiffs' reasoning, it would be saying that all legislation is temporary because Congress can always change it. Instead, the law requires us to treat legislation as fully enforceable until it is later repealed by subsequent legislation. As a result, the 1988 enactment of ELIHPA, rather than any other legislation, immediately restricted the Plaintiffs' right to prepay their loans at any time at their option because it placed certain restrictions on prepayment.

Moreover, even though the Federal Circuit in *Alder Terrace* found that ELIHPA was a temporary measure in dealing specifically with HUD loans, the court found that Plaintiff was on notice that the Emergency Act of 1988 and its 1988 interim implementing regulations negated its contractual prepayment right, effective in January 1989. *Alder Terrace v. United States*, 161 F.3d 1372, 1379 (Fed. Cir.1998). In *Alder Terrace*, the plaintiff alleged damages as a result of the failure to allow prepayment according to the contract. *Id.* at 1373. The court held that the plaintiff's claims accrued on its contractual 20-year prepayment date of January 5, 1989. *Id.* at 1379. The Federal Circuit stated, "The fact that the Emergency Act was expressly a temporary measure does not impact our analysis. On January 5, 1989, the Emergency Act was in force and, under the [plaintiff's] analysis, was preventing the [plaintiff] from exercising its prepayment right." *Id.* at 1377.

This reasoning is consistent with *Alder Terrace*. In the case at bar, the pre-1979 loan holders allege that the Defendant breached the contractual right to prepay their loans at any time at their option. Unlike the plaintiffs in *Alder Terrace*, the pre-1979 contract holders were not required to wait 20 years before they could exercise their option to

prepay at any time. Therefore, in this case, immediately upon enactment of the 1988 legislation the pre-1979 loan holders were on notice that they could no longer prepay their loans at any time at their option. According to *Alder Terrace*, the fact that the provisions concerning FmHA were temporary rather than permanent is irrelevant to the analysis. It remains that the 1988 legislation was in force and prevented the pre-1979 loan holders from exercising their prepayment right. Therefore, the claims of the pre-1979 contract holders accrued upon enactment of ELIHPA in 1988, the event that occurred to fix the alleged liability of Defendant, thus enabling Plaintiffs to bring suit.

4. Anticipatory Repudiation

In the alternative, Plaintiffs argue that the 1992 legislation constituted an anticipatory repudiation. Plaintiffs contend that the limitations period as to the claim of any Plaintiff does not commence to run until the date on which Defendant, but for its repudiation, would have been required to accept the exercise of that Plaintiff's termination option. Thus, according to Plaintiffs, acceptance occurs on whatever date in the future Plaintiffs choose to prepay their mortgages.

An anticipatory repudiation occurs when an obligor communicates to an obligee that the obligor will commit a breach in the future. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed.Cir.1988). The aggrieved party is entitled to sue either when the anticipatory repudiation occurs or at the later time for performance under the contract. Calvin W. Corman, Limitation of Actions § 7.2.1 (1991). Generally, the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory breach. *Kinsey*, 852 F.2d at 558. However, if the breach is "not wholly anticipatory because it involves some contractual nonperformance, the statute of limitations begins to run immediately." *Id.*

This Court finds Plaintiffs' anticipatory repudiation theory unpersuasive. Plaintiffs incorrectly claim that the Defendant, according to the promissory note, is required to accept prepayment from the pre-1979 Plaintiffs. The contract language at issue allows the pre-1979 Plaintiffs to prepay their loans at any time at their option. The prepayment provision in the promissory note states, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." A close examination of the language indicates that the performance required of the Government was to allow the pre-1979 Plaintiffs the option to prepay at any time. Therefore, the enactment of ELIHPA constituted an actual breach rather than an anticipatory repudiation because it immediately altered the right of the pre-1979 loan holders to prepay at any time at their option. The specific contractual nonperformance that occurred was the inability of FmHA, as a result of the 1988 legislation, to allow Plaintiffs to prepay at any time. Thus, Plaintiffs' claim is based on an alleged breach rather than the theory of anticipatory repudiation. The enactment of ELIHPA in 1988 was the event that occurred to fix the alleged liability of Defendant which triggered the statute of limitations. Plaintiffs were on notice that their unqualified right to prepay their loans at any time was breached, if at all, in 1988.

The pre-1979 Plaintiffs are not barred from prepaying their loans. They may still prepay subject to various restrictions imposed by the 1988 legislation. The contractual right that Plaintiffs' claim was breached was the so-called "unfettered right" to prepay their loans at any time at their option.

This reasoning is consistent with other decisions of this court. In *Adams v. United States*, the court stated:

> [T]he performance required by the government was to allow plaintiffs to prepay at any time, thereby

> terminating the low-income affordability restrictions. Because the enactment of ELIHPA legally barred FmHA from allowing plaintiffs to prepay at any time, the statute of limitations began to run from that date [the enactment of ELIHPA].

Adams v. United States, 42 Fed.Cl. 463, 474 (1998). In *Franconia Assocs. v. United States*, the court stated, "The government's performance, if it can be called that, is to keep its promise to allow borrowers an unfettered prepayment right. No further performance was required by the government under the terms of the prepayment clause." *Franconia Assoc. v. United States*, 43 Fed.Cl. 702, 710 (1999).

This reasoning is also consistent with the court in the context of HUD-insured housing programs. In *Anaheim Gardens v. United States*, the court held that the plaintiff's breach of contract claims accrued at either the enactment of ELIHPA or the 20-year anniversary date of the loan, whichever date was later. *Anaheim Gardens v. United States*, 33 Fed.Cl. 773, 777 (1995).[3] In *Anaheim Gardens*, the court did not wait until plaintiffs exercised their option to prepay and the Government had to accept prepayment to begin the statute of limitations. Rather, the court focused on the nature of the contractual right. In *Anaheim Gardens*, they could not prepay without permission until the 20-year anniversary of each of their loans. *Id.* The statute of limitations in *Anaheim Gardens* began to run when plaintiffs were no longer allowed to exercise their option pursuant to their contract. *Id.* This principle applies with equal force to the Plaintiffs in this case. Since the Plaintiffs' right to prepay already existed when ELIHPA was enacted, the legislation breached this right at the time of enactment.

[3] The plaintiffs were permitted to prepay their mortgages with HUD's permission during the first 20 years of the loan. *Anaheim Gardens*, 33 Fed.Cl. at 774. However, after 20 years, the property owners could prepay without HUD's permission. *Id.* ELIPHA and a subsequent statute imposed certain restrictions upon this prepayment provision. *Id.*

Plaintiffs also rely on the "stabilization doctrine" in takings law to support their contention that Plaintiffs should not be penalized for waiting to sue until the 1992 legislation. In *Dickinson*, plaintiff brought a takings claim under the Tucker Act for flooding caused by the Government's construction of a river dam. *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). The court allowed the party to delay filing the lawsuit until it was determined whether the taking of plaintiff's property by flooding was temporary or permanent. *Id.* at 750, 67 S.Ct. 1382.[4]

The "stabilization doctrine" in takings law has no application to the statute of limitations in this case. The Federal Circuit in *Ariadne Financial Services Pty., Ltd. v. United States*, rejected the application of the doctrine outside of the context of a taking. *Ariadne*, 133 F.3d 874, 879 (Fed.Cir.1998). The court stated: "the *Dickinson* stabilization principle, however, does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated." *Id.*; *See*, e.g., *United States v. Dow*, 357 U.S. 17, 27, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use.") Nonetheless, even if the Court were to apply the doctrine, the claim in this case is not a "continuing process of physical events." *Dickinson*, 331 U.S. at 749, 67 S.Ct. 1382. Rather, the passage of the 1988

[4] In *Dickinson*, the Supreme Court stated, "All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really taken." *Dickinson*, 331 U.S. at 749, 67 S.Ct. 1382.

legislation constitutes a single event that prevented Plaintiffs from exercising their right to prepay at any time.

Therefore, because the breach of contract claims of Plaintiffs holding loans entered into before December 21, 1979, accrued on February 5, 1988, and this action was filed on September 16, 1998, these Plaintiffs' contract claims are barred by the statute of limitations and are dismissed.

B. Plaintiffs' Motion for Partial Summary Judgment

1. Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Jay v. Secretary*, DHHS, 998 F.2d 979 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non- moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1307 (Fed.Cir.1998) and draw all reasonable inferences in its favor. See *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir.1995).

2. Arguments

Plaintiffs move for partial summary judgment on Count I, the breach of contract claim. This motion concerns Plaintiffs holding post-1979 contracts. Plaintiffs argue that Defendant anticipatorily repudiated the termination option

in contracts entered between Plaintiffs and Defendant by enacting legislation that restricted any owner's future exercise of the termination option. Plaintiff maintains that ELIHPA, the 1992 legislation and the administrative procedures it established are inconsistent with Plaintiffs' termination option for three reasons. First, the legislation does not permit owners to exercise their right at their own option because owners are required to seek Defendant's authorization before any termination option can be exercised. Second, the procedures do not permit owners to exercise any termination option at the time of their own choosing. Third, the procedures place those owners who want to exercise their termination option without any restriction in a position of being compelled to participate in a "forced-sale proceeding" and risk losing their properties entirely.

Plaintiffs also contend that the termination option constitutes a bargained- for element of each Plaintiff's contract with Defendant and not merely a non- binding statement of regulatory policy as it existed when the contract was executed. Plaintiffs maintain that Defendant's inability to perform its contractual obligation that it would not subject Plaintiffs to future inconsistent regulations, makes it liable for breach of contract damages.

In opposition, Defendant raises the unmistakability doctrine. The Defendant argues that even if the prepayment provisions of ELIHPA and the 1992 legislation are inconsistent with the prepayment term so as to otherwise constitute a breach, the unmistakability doctrine bars Plaintiffs' contract claims. Defendant contends that under the contract terms at issue, the FmHA did not unmistakably promise not to subject the loan documents to future legislation.

In contrast, Plaintiffs argue that the applicability of the unmistakability doctrine is dependent upon whether the sovereign acts defense is available. Here, Plaintiffs state that they seek only to enforce Defendant's legal obligation to pay

damages for repudiating its contractual obligation to permit Plaintiffs to exercise their termination option. Therefore, because Plaintiffs do not seek to block the sovereign from exercising its powers to enact legislation, the unmistakability doctrine is inapplicable.

In this case, the Defendant does not raise the sovereign acts doctrine as a defense. However, in response to Plaintiffs' argument, the Defendant contends that the applicability of the unmistakability doctrine does not depend upon the applicability of the sovereign acts doctrine. Defendant argues that the unavailability of one in a given case does not automatically preclude the application of the other. The determination of whether a statute is a public and general act is unrelated to the determination of whether a contract contains language that unmistakably exempts a party from the effects of legislation.

There are no genuine issues of material fact in dispute. Thus, the Court must decide as a matter of law whether the Defendant breached Plaintiffs' contracts by enacting subsequent legislation that altered Plaintiffs' prepayment right.

3. The Unmistakability Doctrine

The first issue is whether the unmistakability doctrine is applicable to the contracts in this case. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1578 (Fed.Cir.1997). Under this doctrine, which is a canon of contract construction, a governmental surrender of sovereign authority must be expressed in unmistakable terms in the contract. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986). "Contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982)). Thus, "a

contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power." *United States v. Winstar Corp.*, 518 U.S. 839, 878, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). "The underlying presumption is that contracts with the government will be subject to later contrary legislation unless there is a clear promise otherwise in the contract itself." *Franconia Assoc. v. United States*, 43 Fed.Cl. 702, 713 (1999).

Recently, the Supreme Court in *Winstar* engaged in an extensive discussion of the unmistakability doctrine. In *Winstar*, the Supreme Court held that the United States was liable for breach of contract arising out of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). *Winstar*, 518 U.S. at 839, 116 S.Ct. 2432. The Supreme Court found that three savings and loans institutions had entered into contracts with the Government whereby they agreed to acquire failing thrifts in return for favorable accounting treatment. *Id.* at 848, 116 S.Ct. 2432. The favorable accounting treatment allowed the savings and loans institutions to count "supervisory goodwill" towards their capitalization requirements. *Id.* at 850-51, 116 S.Ct. 2432. However, the enactment of FIRREA barred this accounting practice and, as a result, federal regulators seized and liquidated two of the three banks. *Id.* at 858, 116 S.Ct. 2432. The Supreme Court found the Government liable for breach of contract. *Id.* at 910, 116 S.Ct. 2432.

Since the decision in *Winstar*, courts have struggled with its meaning. The *Winstar* decision was a plurality opinion; seven justices agreed on the issue of Government liability but their reasoning differed, including whether the unmistakability doctrine was applicable to the contracts in

the case.[5] In this case, Plaintiffs rely on Justice Souter's reasoning in *Winstar* that the application of the unmistakability doctrine turned on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the government. *Winstar*, 518 U.S. at 879, 116 S.Ct. 2432. Specifically, Plaintiffs rely on the following in Justice Souter's plurality opinion:

> So long as such a contract is reasonably construed to include a risk- shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. *Id.* at 880, 116 S.Ct. 2432.

Here, Plaintiffs allege that the contract includes a risk-shifting component; that is, FmHA accepted the risk that future legislative changes requiring it to subject owners to inconsistent regulatory measures would force it to indemnify owners for losses stemming from its nonperformance. Thus, Plaintiffs allege that the unmistakability doctrine should not apply.

However, a majority of the justices in *Winstar* found that the unmistakability doctrine applied to all government contracts, regardless of the nature of the contract or remedy sought.[6] The Federal Circuit in Yankee Atomic adopted the

---

[5] For an informative discussion of the various opinions in *Winstar* see *Adams v. United States*, 42 Fed.Cl. 463, 481-83 (1998).

[6] The concurrence and the dissent comprised the majority of justices who found the unmistakability doctrine applicable to all government contracts. *Winstar*, 518 U.S. 839, 116 S.Ct. 2432. The concurrence consisted of Justices Scalia, Kennedy and Thomas. *Id.* The dissent included Chief Justice Rehnquist and Justice Ginsburg. *Id.* The plurality opinion, joined by four justices, found that the unmistakability doctrine was inapplicable because they read the contracts as containing provisions essentially shifting the risk of legislation to the Government. *Id.* at 880-81, 116 S.Ct. 2432. However, the five justices comprising the concurrence and dissent

view of the five justices in *Winstar* regarding the applicability of the unmistakability doctrine. *Yankee Atomic*, 112 F.3d at 1579. There, the Federal Circuit reasoned that the unmistakability doctrine applied in the case because "this conclusion respects the view of the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts." *Id.* Thus, the Court follows the Federal Circuit's reasoning that the unmistakability doctrine should be applied to all government contracts.

Although the statement from the Federal Circuit in Yankee Atomic resolves this issue, it should be noted that other judges from the Court of Federal Claims reached the same result. In *Franconia Assoc.*, the court found the "controlling holding on the doctrine" as expressed by the majority of the Supreme Court to be that the unmistakability doctrine "must be used in interpreting all government contracts." *Franconia Assoc.*, 43 Fed.Cl. at 714. In *Adams*, the court also found the unmistakability doctrine applicable, stating that the doctrine "applies even if the contract can be reasonably construed as a risk-shifting agreement and the enforcement of the agreement would not effectively bar the exercise of a sovereign power." *Adams*, 42 Fed.Cl. at 482-83.

Since this case involves a government contract and Plaintiffs have alleged that an act of Congress breached the contract, the Court finds that the unmistakability doctrine should be applied. The next issue is whether the Government made an unmistakable promise not to subject Plaintiffs' prepayment option to contrary legislation.

4. Application of the Unmistakability Doctrine

Plaintiffs argue that if the unmistakability doctrine applies, this Court should find that an unmistakable promise

---

believed that the plurality had misapplied precedent. *Id.* at 919, 116 S.Ct. 2432.

was made not to subject the prepayment option to future inconsistent regulations.

What constitutes an unmistakable promise? In *Winstar*, the concurrence found that the contract at issue included an unmistakable promise to regulate the savings and loans in a particular manner in the future. *Winstar*, 518 U.S. at 922, 116 S.Ct. 2432. As pointed out by the court in *Franconia*, the concurrence explained that the "contract itself" was an unmistakable promise and to say otherwise would have rendered the contract illusory. *Franconia*, 43 Fed.Cl. at 715 (citing *Winstar*, 518 U.S. at 921, 116 S.Ct. 2432 (Scalia, J., concurring)). Justice Scalia went further to state, "Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires." *Winstar*, 518 U.S. at 922, 116 S.Ct. 2432.

Here, Plaintiffs attempt to draw an analogy between the prepayment term in the contracts in this case to the promise to afford favorable accounting treatment to Plaintiffs' in *Winstar*. This analogy falls short. In *Winstar*, the court found the accounting treatment to be granted supervisory goodwill and capital credits the subject of the express agreements between the regulators and the acquiring financial institutions. *Id.* at 853-55, 116 S.Ct. 2432. It was the purpose of the agreements. It is logical to conclude that the financial institutions would not have contracted with the government to acquire the failing thrifts without this favorable accounting treatment. When the Federal Circuit ruled on *Winstar*, they stated "if supervisory good will had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation." *Winstar v. United States*, 64 F.3d 1531, 1542 (Fed.Cir.1995). Moreover, the terms and conditions of the agreement were reached through extensive negotiations

between regulators and the financial institutions. *Id.* at 1536. This is evidenced by the numerous documents which comprise the "Agreement" of the parties. *Id.* at 1541.

In the case at bar, borrowers lacked bargaining power over the prepayment provision contained in the promissory notes. Here, borrowers entered into contracts with the FmHA for the purpose of providing low-income housing to eligible persons in return for low-interest loans at rates unavailable in the market. Here, unlike the special accounting procedures in *Winstar*, the prepayment provision was prescribed by regulation. While the prepayment provision in the contracts is an important provision, it is not the "quid pro quo" or the purpose of the contracts as was the promise to afford favorable accounting treatment in *Winstar*. Contrary to Plaintiffs' beliefs, the prepayment provision contained in the standard form promissory note is not the essence of the agreement. Here, striking the prepayment provision from the promissory note leaves a viable contract. In contrast, striking the favorable accounting treatment from the *Winstar* contracts, the essence of the agreement is destroyed--nothing is left. Thus, under this analysis no unmistakable promise can be found.

In the case at bar, the provisions that Plaintiffs claim unmistakably promise to insulate the prepayment provision from subsequent acts of Congress read as follows: "This note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Additionally, Defendant points out that promissory notes executed by at least two Plaintiffs, Grass Valley Terrace and The Highlands, reads: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations and provisions hereof." Def. Reply Brief, n. 16, at 24.

In examining the plain language of these provisions, it cannot be concluded that the Government surrendered its

sovereign power to enact subsequent legislation. In the first provision, the language at issue prevents the Farmers Home Administration from enacting future inconsistent regulations. However, we cannot expand this language to include changes in legislation. See *Parkridge Investors v. Farmers Home Admin.*, 13 F.3d 1192, 1198 (finding that future regulations are not synonymous with future acts of Congress). The unmistakability doctrine specifically precludes a reading of any unstated terms. One can not infer that "future regulations" meant to include subsequent legislation.

Moreover, the latter prepayment provision clearly indicates that Plaintiffs assumed the risk of future regulatory and legislative changes.

Recently, the Court of Federal Claims applied the unmistakability doctrine in *Franconia* and *Adams*. *Franconia*, 43 Fed.Cl. 702; *Adams*, 42 Fed.Cl. 463. In both of these cases the court found identical language not to constitute an unmistakable promise that future legislation would not affect the prepayment terms of Plaintiffs' promissory notes. In *Franconia*, the court stated:

> [T]hat it is likely that some property owners might not have entered into the agreements had the prepayment terms been less generous–it was not the reason for the agreement. By definition, a prepayment provision is not going to be the purpose of a loan.

Franconia, 43 Fed.Cl. at 715.

In *Adams*, the court stated:

> Implying a surrender of sovereign power from the contract's prepayment term cannot be termed unmistakable. Indeed, if the surrender of sovereign power were to be implied, such a promise would be no different than what applies to private parties, but more than this is required under the unmistakability doctrine.

Adams, 42 Fed.Cl. at 483.

Because the Court finds that the Government did not promise in unmistakable terms that it would not exercise its sovereign power to enact subsequent legislation to carry out the purpose of the FmHA loans, Plaintiffs' motion for partial summary judgment as to Count I of Plaintiffs' complaint is DENIED.

VI. Conclusion

Pursuant to RCFC 54(b), inasmuch as there appears to be no just reason for delay, it is hereby ORDERED that Defendant's motion to dismiss the claims of pre-1979 contract holders because the claims violate the statute of limitations is GRANTED. The Clerk is directed to dismiss all Plaintiffs holding pre-1979 contracts.[7] It is further ORDERED that Plaintiffs' motion for partial summary judgment is DENIED. The parties shall contact the Court within 2 weeks

[7] The Clerk is ORDERED to dismiss the breach of contract claims of the following Plaintiffs: (1) Majorie W. Kassner, (2) Eileen Kothe, (3) Peters, Williams & Kubota, a general partnership, (4) Pine Needles Apartments Limited Partnership, (5) Richard and Beatrice Schmidtbauer, (6) The Highlands, and (7) a portion of NRCB Limited Partnership breach of contract claim relating to its December 31, 1975 loan. The Court does not decide today whether ABCD Trust is a "pre-1979" or "post-1979" Plaintiff. The Court will hear argument on this issue later.

of the date of this opinion to schedule a status conference to discuss the remainder of the case.

United States court of Appeals for the Federal Circuit

99-5123

FRANCONIA ASSOCIATES, DAVID HODGES, SR. C/O HODGES DEVELOPMENT CORP, JOANNE M. HODGES, R.C. GETTY APARTMENTS, R.C. MO APARTMENTS, R.C. PIERRE APARTMENTS, R.C. SPRINGS APARTMENTS, SCENIC VALLEY ASSOCIATES, VALLEY ASSOCIATES, DUBLIN PLAZA, INC., EVERGREEN MANOR ASSOCIATES, FOX RIDGE PHASE II, MARILYN GRAHAM, GREENWAY OF ALTOONA ASSOCIATES, PHASE I, GREENWAY OF NEWTON ASSOCIATES, PHASE I, PHOEBE J. PERRI, PINE NEEDLES APARTMENTS, PRAIRIE VILLAGE OF ALTOONA ASSOCIATES, PRAIRIE VILLAGE OF GRIMES ASSOCIATES, PRAIRIE VILLAGE OF HUXLEY ASSOCIATES, PRAIRIE VILLAGE OF LAPORTE CITY ASSOCIATES, PRAIRIE VILLAGE OF SLATER ASSOCIATES, PRAIRIE VILLAGE OF STATE CENTER ASSOCIATES, TIMBERBROOK PROPERTIES and BRIAN E. WELLS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 19, 2001.

FOR THE COURT,
/s/
Jan Horbaly
Clerk

Dated: June 12, 2001

cc: Jeff H. Eckland
Mark L. Josephs

FRANCONIA ASSOCIATES V US, 99-5123
(CFC - 97-CV-381)

PUBLIC LAW 100-242 [S. 825]; February 5, 1988

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1987

TITLE II-PRESERVATION OF LOW INCOME HOUSING

Subtitle A-General Provisions

SEC. 201. SHORT TITLE.

This title may be cited as the "Emergency Low Income Housing Preservation Act of 1987".

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS.–The Congress finds that–

(1) in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 of the National Housing Act could be lost as a result of the termination of low income affordability restrictions;

(2) in the next decade, more than 465,000 low income housing units produced with assistance under section 8 of the United States Housing Act of 1937 could be lost as a result of the expiration of the rental assistance contracts;

(3) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners;

(4) the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither

anticipated nor intended when contracts for these units were entered into;

(5) the loss of this affordable housing, to encourage the production of which the public has provided substantial benefits over past years, would irreparably damage hard-won progress toward such important and long-established national objectives as–

(A) providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans;

(B) increasing the supply of housing affordable to low income Americans that is accessible to employment opportunities; and

(C) expanding housing opportunities for all Americans, particularly members of disadvantaged minorities;

(6) the provision of an adequate supply of low income housing has depended and will continue to depend upon a strong, long-term partnership between the public and private sectors that accommodates a fair return on investment;

(7) recent reductions in Federal housing assistance and tax benefits related to low income housing have increased the incentives for private industry to withdraw from the production and management of low income housing;

(8) efforts to retain this housing must take account of specific financial and market conditions that differ markedly from project to project;

(9) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations; and

(10) until the Congress can act on recommendations that will emerge from this review, interim measures are

needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

(b) PURPOSE.–It is the purpose of this title–

(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance;

(2) to minimize the involuntary displacement of tenants currently residing is such housing; and

(3) to continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

SEC. 203. TERMINATION OF CERTAIN PROVISIONS.

(a) IN GENERAL.–Effective upon the expiration of the 2-year period beginning on the date of the enactment of this Act–

(1) subtitles B and D are repealed; and

(2) each provision of law amended by subtitle B or D is amended to read as it would without such amendment.

(b) SAVINGS PROVISION.–The repeal or amendment of any provision under subsection (a) shall have no effect on any action taken or authorized under the provision prior to such repeal or amendment.

* * *

Subtitle C–Rural Rental Housing Displacement Prevention

SEC. 241. PREPAYMENT AND REFINANCING PROCEDURES.

Section 502(c) of the Housing Act of 1949 is amended by adding at the end the following new paragraphs:

"(3) NOTICE OF OFFER TO PREPAY.–Not less than 30 days after receiving an offer to prepay any loan made or insured

under section 514 or 515, the Secretary shall provide written notice of the offer or request to the tenants of the housing and related facilities involved, to interested nonprofit organizations, and to any appropriate State and local agencies.

"(4)(A) AGREEMENT BY BORROWER TO EXTEND LOW INCOME USE.-Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of, any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

"(B) ASSISTANCE AVAILABLE TO BORROWER TO EXTEND LOW INCOME USE.-To the extent of amounts provided in appropriation Acts, the agreement under subparagraph (A) may provide for 1 or more at the following forms of assistance that the Secretary, after taking into account local market conditions, determines to be necessary to extend the low income use of the housing and related facilities involved:

"(i) Increase in the rate of return on investment.

"(ii) Reduction of the interest rate on the loan through the provision of interest credits under section 521(a)(1)(B).

"(iii) Additional rental assistance, or an increase is assistance provided under existing contracts, under section 521(a)(2) or under section 8 of the United States Housing Act of 1937.

"(iv) An equity loan to the borrower under paragraphs (7) and (8) of section 515(b).

"(v) Incremental rental assistance in connection with loans under clauses (ii) and (iv) to the extent necessary to avoid increase in the rental payments of current tenants

not receiving rental assistance under section 521(a)(2) or under section 8 of the United States Housing Act of 1937.

"(C) APPROVAL OF ASSISTANCE.-The Secretary may approve assistance under subparagraph (B) only if the Secretary determines that the combination of assistance provided-

"(i) is necessary to provide a fair return on the investment of the borrower, and

"(ii) is the least costly alternative for the Federal Government that is consistent with carrying out the purposes of this subsection.

"(5)(A) OFFER TO SELL TO NONPROFIT ORGANIZATIONS AND PUBLIC AGENCIES.-

"(i) IN GENERAL.-If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided is subparagraph (G)) to offer to sell the assisted housing and related facilities involved to any qualified nonprofit agency at a fair market value determined by 2 independent appraisers, one of whom shall be selected by the Secretary and one of whom shall be selected by the borrower. If the 2 appraisers fail to agree on the fair market value, the Secretary and the borrower shall jointly select a third appraiser, whose appraisal shall be binding on the Secretary and the borrower.

"(ii) PERIOD FOR WHICH REQUIREMENT APPLICABLE.-If, upon the expiration of 180 days after an offer is made to sell housing and related facilities under clause (i), no qualified nonprofit organization or public agency has made a bona fide offer to purchase, the Secretary may accept the offer to prepay, or may request refinancing in accordance with subsection (b)(3) of, the loan. This clause shall apply only when funds are available for purposes of carrying out a transfer under this paragraph.

"(B) Qualified nonprofit organizations and public agencies.-

"(i) LOCAL NONPROFIT ORGANIZATION OR PUBLIC AGENCY.-A local nonprofit organization or public agency may purchase housing and related facilities under this paragraph only if-

"(I) the organization or agency is determined by the Secretary to be capable of managing the housing and related facilities (either directly or through a contract) for the remaining useful life of the housing and related facilities; and

"(II) the organization or agency has entered into an agreement that obligates it (and successors in interest thereof) to maintain the housing and facilities as affordable for very low-income families or persons and low income families or persons for the remaining useful life of the housing and related facilities.

"(ii) NATIONAL OR REGIONAL NONPROFIT ORGANIZATION.-If the secretary determines that there is no local nonprofit organization or public agency qualified to purchase the housing and related facilities involved, the Secretary shall require the borrower to offer to sell the assisted housing and related facilities to an existing qualified national or regional nonprofit organization.

"(C) FINANCING OF SALE-To facilitate the sale described in subparagraph (A), the Secretary shall-

"(i) to the extent provided in appropriation Acts, make an advance to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to cover any direct costs (other than the purchase price) incurred by the organization or agency in purchasing and assuming responsibility for the housing and related facilities involved;

"(ii) approve the assumption, by the nonprofit organization or public agency involved, of the loan made or insured under section 514 or 515;

"(iii) to the extent provided in appropriation Acts, transfer any rental assistance payments that are received under section 521(a)(2)(A), or under section 8 of the United States Housing Act of 1937, with respect to the housing and related facilities involved; and

"(iv) to the extent provided in appropriation Acts, provide a loan under section 515(c)(3) to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to enable the organization or agency to purchase the housing and related facilities involved.

"(D) RENT LIMITATION AND ASSISTANCE.-The Secretary shall, to the extent provided in appropriation Acts, provide to each nonprofit organization or public agency purchasing housing and related facilities under this paragraph financial assistance (in the form of monthly payments or forgiveness of debt) in an amount necessary to ensure that the monthly rent payment made by each low income family or person residing in the housing does not exceed the maximum rent permitted under section 521(a)(2)(A).

"(E) RESTRICTION ON SUBSEQUENT TRANSFERS.-Except as provided is subparagraph (B)(ii), the Secretary may not approve the transfer of any housing and related facilities purchased under this paragraph during the remaining useful life of the housing and related facilities, unless the Secretary determines that-

"(i) the transfer will further the provision of housing and related facilities for low income families or persons; or

"(ii) then is no longer a need for such housing and related facilities by low income families or persons.

"(F) GENERAL RESTRICTION ON PREPAYMENTS AND REFINANCINGS.-Following the transfer of the maximum

number of dwelling units set forth in subparagraph (H)(i) in any fiscal year or the maximum number of dwelling units for which budget authority is available in any fiscal year, the Secretary may not accept in such fiscal year any offer to prepay, or request refinancing in accordance with subsection (b)(3) of, any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, except in accordance with subparagraph (G). The limitation established in this subparagraph shall not apply to an offer to prepay, or request to refinance, if, following the date on which such offer or request is made (or following the date of the enactment of the Housing and Community Development Act of 1987, whichever occurs later) a 15-month period expires during which no budget authority is available to carry out this paragraph. For purposes of this subparagraph, the Secretary shall allocate budget authority under this paragraph in the order in which offers to prepay, or request to refinance, are made.

"(G) EXCEPTION.–This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3), any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, if–

"(i) the borrower enters into an agreement with the Secretary that obligates the borrower (and successors in interest thereof)–

"(I) to utilize the assisted housing and related facilities for the purposes specified in action 514 or 515, as the case may be, for the a period described in paragraph (1)(B) calculated from the date on which the loan is made or insured); and

"(II) upon termination of the period described in paragraph (1)(B), to offer to sell the assisted housing and facilities to a qualified nonprofit organization or public agency in accordance with this paragraph; or

"(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that–

"(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

"(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

"(H) FUNDING.–

"(i) BUDGET LIMITATION.–Not more than 5,000 dwelling units may be transferred under this paragraph in any fiscal year, and the budget authority that may be provided under this paragraph for any fiscal year may not exceed the amounts required to carry out this paragraph with respect to such number.

"(ii) REIMBURSEMENT OF RURAL HOUSING INSURANCE FUND.–There are authorized to be appropriated to the Rural Housing Insurance Fund such sums as may be necessary to reimburse the Fund for financial assistance provided under this paragraph, paragraph (4), and section 517(j)(7).

"(I) Definition.–For purposes of this paragraph, the term 'non-profit organization' means any private organization–

"(i) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; and

"(ii) that is approved by the Secretary as to financial responsibility.

"(J) REGULATIONS.–Notwithstanding section 534, the Secretary shall issue final regulations to carry out this paragraph not later than 60 days after the date of the enactment of the Housing and Community Development Act of 1987. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.".

SEC. 242. EQUITY RECAPTURE LOANS AND LOANS TO NONPROFIT ORGANIZATIONS AND PUBLIC AGENCIES.

Section 515 of the Housing Act of 1949 is amended–

(1) by redesignating subsections (c) through (p) as subsections (d) through (q), respectively; and

(2) by inserting after subsection (b) the following:

"(c) with respect to a loan made or insured under subsection (a) or (b), the Secretary is authorized to–

"(1) make or insure an equity loan in the form of a supplemental loan for the purpose of equity takeout to the owner of housing financed with a loan made or insured under this section pursuant to a contract entered into before December 21, 1979, for the purpose of extending the affordability of the housing for low income families or persons and very low-income families or persons for not less than 20 years, except that such loan may not exceed 90 percent of the value of the equity in the project as determined by the Secretary;

"(2) transfer and reamortize an existing loan in connection with assistance provided under paragraph (1); and

"(3) make or insure a loan to enable a nonprofit organization or public agency to make a purchase described in section 502(c)(5).".

SEC. 243. USE OF RURAL HOUSING INSURANCE FUND.

Section 517(j) of the Housing Act of 1949 is amended–

(1) by striking "and" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(7) to provide advances and assistance required to carry out paragraphs (4) and (5) of section 502(c).".

28 U.S.C. § 2501. (1994)

§ 2501. Time for filing suit

Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

42 U.S.C. § 1472 (1994)

§ 1472. Loans for housing and buildings on adequate farms

* * *

(c) Prepayment and refinancing provisions

* * *

(4) (A) Agreement by borrower to extend low income use

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

(B) Assistance available to borrower to extend low income use

To the extent of amounts provided in appropriation Acts, the agreement under subparagraph (A) may provide for 1 or more of the following forms of assistance that the Secretary, after taking into account local market conditions, determines to be necessary to extend the low income use of the housing and related facilities involved:

(i) Increase in the rate of return on investment.

(ii) Reduction of the interest rate on the loan through the provision of interest credits under section 1490a(a)(1)(B) of this title.

(iii) Additional rental assistance, or an increase in assistance provided under existing contracts, under section 1490a(a)(2) of this title or under section 1437f of this title.

(iv) An equity loan to the borrower under paragraphs (1) and (2) of section 1485(c) of this title.

(v) Incremental rental assistance in connection with loans under clauses (ii) and (iv) to the extent necessary to avoid increases in the rental payments of current tenants not receiving rental assistance under section 1490a(a)(2) of this title or under section 1437f of this title.

(vi) In the case of a project that has received rental assistance under section 1437f of this title, permitting the owner to receive rent in excess of the amount determined necessary by the Secretary to defray the cost of long-term repair or maintenance of such a project.

(C) Approval of assistance

The Secretary may approve assistance under subparagraph (B) only if the Secretary determines that the combination of assistance provided-

(i) is necessary to provide a fair return on the investment of the borrower; and

(ii) is the least costly alternative for the Federal Government that is consistent with carrying out the purposes of this subsection.

(5) (A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at

a fair market value determined by 2 independent appraisers, one of whom shall be selected by the Secretary and one of whom shall be selected by the borrower. If the 2 appraisers fail to agree on the fair market value, the Secretary and the borrower shall jointly select a third appraiser, whose appraisal shall be binding on the Secretary and the borrower.

(ii) Period for which requirement applicable

If, upon the expiration of 180 days after an offer is made to sell housing and related facilities under clause (i), no qualified nonprofit organization or public agency has made a bona fide offer to purchase, the Secretary may accept the offer to prepay, or may request refinancing in accordance with subsection (b)(3) of this section of, the loan. This clause shall apply only when funds are available for purposes of carrying out a transfer under this paragraph.

(B) Qualified nonprofit organizations and pubic agencies

(i) Local nonprofit organization or public agency

A local nonprofit organization or public agency may purchase housing and related facilities under this paragraph only if-

(I) the organization or agency is determined by the Secretary to be capable of managing the housing and related facilities (either directly or through a contract) for the remaining useful life of the housing and related facilities; and

(II) the organization or agency has entered into an agreement that obligates it (and successors in interest thereof) to maintain the housing and related facilities as affordable for very low-income families or persons and low

income families or persons for the remaining useful life of the housing and related facilities.

(ii) National or regional nonprofit organization

If the Secretary determines that there is no local nonprofit organization or public agency qualified to purchase the housing and related facilities involved, the Secretary shall require the borrower to offer to sell the assisted housing and related facilities to an existing qualified national or regional nonprofit organization.

(iii) Selection of qualified purchaser

The Secretary shall promulgate regulations that establish criteria for selecting a qualified nonprofit organization or public agency to purchase housing and related facilities when more than 1 such organization or agency has made a bona fide offer. Such regulations shall give a priority to those organizations or agencies with the greatest experience in developing or managing low income housing or community development projects and with the longest record of service to the community.

(C) Financing of sale

To facilitate the sale described in subparagraph (A), the Secretary shall–

(i) to the extent provided in appropriation Acts, make an advance to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to cover any direct costs (other than the purchase price) incurred by the organization or agency in purchasing and assuming responsibility for the housing and related facilities involved;

(ii) approve the assumption, by the nonprofit organization or public agency involved, of the loan made or insured under section 1484 or 1485 of this title;

(iii) to the extent provided in appropriation Acts, transfer any rental assistance payments that are received under section 1490a(a)(2)(A) of this title, or under section 1437f of this title, with respect to the housing and related facilities involved; and

(iv) to the extent provided in appropriation Acts, provide a loan under section 1485(c)(3) of this title to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to enable the organization or agency to purchase the housing and related facilities involved.

(D) Rent limitation and assistance

The Secretary shall, to the extent provided in appropriation Acts, provide to each nonprofit organization or public agency purchasing housing and related facilities under this paragraph financial assistance (in the form of monthly payments or forgiveness of debt) in an amount necessary to ensure that the monthly rent payment made by each low income family or person residing in the housing does not exceed the maximum rent permitted under section 1490a(a)(2)(A) of this title.

(E) Restriction on subsequent transfers

Except as provided in subparagraph (B)(ii), the Secretary may not approve the transfer of any housing and related facilities purchased under this paragraph during the remaining useful life of the housing and related facilities, unless the Secretary determines that–

(i) the transfer will further the provision of housing and related facilities for low income families or persons; or

(ii) there is no longer a need for such housing and related facilities by low income families or persons.

(F) General restriction on prepayments and refinancings

Following the transfer of the maximum number of dwelling units set forth in subparagraph (H)(i) in any fiscal year or the maximum number of dwelling units for which budget authority is available in any fiscal year, the Secretary may not accept in such fiscal year any offer to prepay, or request refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, except in accordance with subparagraph (G). The limitation established in this subparagraph shall not apply to an offer to prepay, or request to refinance, if, following the date on which such offer or request is made (or following February 5, 1988, whichever occurs later) a 15-month period expires during which no budget authority is available to carry out this paragraph. For purposes of this subparagraph, the Secretary shall allocate budget authority under this paragraph in the order in which offers to prepay, or request to refinance, are made.

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if–

(i) the borrower enters into an agreement with the Secretary that obligates the borrower (and successors in interest thereof)–

(I) to utilize the assisted housing and related facilities for the purposes specified in section 1484 or 1485 of this title, as the case may be, for a period determined by the Secretary (but not less than the period described in paragraph (1)(B)

calculated from the date on which the loan is made or insured); and

(II) upon termination of the period described in paragraph (1)(B), to offer to sell the assisted housing and related facilities to a qualified nonprofit organization or public agency in accordance with this paragraph; or

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that–

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

(H) Funding

(i) Budget limitation

Not more than 5,000 dwelling units may be transferred under this paragraph in any fiscal year, and the budget authority that may be provided under this paragraph for any fiscal year may not exceed the amounts required to carry out this paragraph with respect to such number.

(ii) Reimbursement of rural housing insurance fund

There are authorized to be appropriated to the Rural Housing Insurance Fund such sums as may be necessary to reimburse the Fund for financial

assistance provided under this paragraph, paragraph (4), and section 1487(j)(7) of this title.

(I) Definitions

For purposes of this paragraph:

(i) Local nonprofit organization

The term "local nonprofit organization" means a nonprofit organization that–

(I) has a broad based board reflecting various interests in the community or trade area; and

(II) is a not-for-profit charitable organization whose principal purposes include developing or managing low income housing or community development projects.

(ii) Nonprofit organization

The term "nonprofit organization" means any private organization–

(I) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual;

(II) that is approved by the Secretary as to financial responsibility; and

(III) that does not have among its officers or directorate persons or parties with a material interest (or persons or parties related to any person or party with such an interest) in loans financed under section 1485 of this title that have been prepaid.

(J) Regulations

Notwithstanding section 1490n of this title, the Secretary shall issue final regulations to carry out this paragraph not later than 60 days after February 5, 1988. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.

* * *

Subpart E-Prepayment and Displacement Prevention of Multi-Family Housing loans

SOURCE: 58 FR 38931, July 21, 1993, unless otherwise noted.

* * *

§ 1965.215 Borrower rejection of incentive offer–approving/ disapproving prepayment.

(a) *Approving or disapproving prepayments.* If the borrower rejects the incentive offer and indicates a preference to prepay, prepayment may be approved in accordance with paragraph (d) of this section within 160 days of the decision that the prepayment can be accepted if the determinations required in paragraph (c) of this section can be made. Exhibit E of this subpart provides additional guidance for making the necessary determinations. The State Director or other designated official in the National Office, with the recommendation of the Servicing Official, will make the decision to either approve or disapprove the prepayment request.

(b) *Determining the need for housing.* (1) The Servicing Office or other designated office will review the following, using exhibit E of this subpart as a guide:

(i) Local market conditions;

(ii) Information submitted as support for the prepayment request;

(iii) Responses to the 30-day tenant comment period;

(iv) the effect of the prepayment on minorities, handicapped individuals, and families with children; and

(v) Any other relevant information.

(2) The results of the determination of need will be documented in the case file.

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. If the decision is made to approve a prepayment request, restrictive-use provisions will be inserted in the deed, deed of release or satisfaction, if the project is determined to be needed under the provisions of the following paragraphs (1)(i) and (ii) of this section. The borrower will also execute the applicable restrictive-use agreement. If the project has section 8 assistance, the local HUD Area Office must be notified. To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

(1) *The loan is not currently subject to restrictive-use provisions nor prohibition on prepayment.* To determine whether a loan not subject to restrictive-use provisions or prohibition on prepayment may prepay, and if so, what restrictions must be inserted in the release documents, the following determinations must be made.

(i) If the Servicing Office cannot make the determination that housing opportunities to minorities will not be materially affected as a result of the prepayment, the borrower may prepay if the borrower agrees to the following restrictions and inclusion of the applicable restrictive language found in paragraph (A) or (B) of exhibit A-4 of this subpart, and to execute the applicable Restrictive-Use Agreement found in exhibit G-2 or G-3 of this subpart:

(A) Maintain the housing for low- and moderate-income people for a minimum period of 20 years from the date of the closing of the last loan or servicing action. At the end of the restrictive-use period, offer to sell the housing to a qualified nonprofit organization or public agency in accordance with paragraph (e)(9) of this section and paragraph (A) of exhibit A-4 of this subpart; or

(B) If 20 years from the date of the closing of the last loan or servicing action has already lapsed, offer to sell the

housing to a qualified nonprofit organization or public agency in accordance with paragraph (e)(9) of this section and paragraph (B) of exhibit A-4 of this subpart;

(ii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, but that there is an inadequate supply of safe, decent, and affordable rental housing within the market area, the borrower may prepay if the borrower agrees to the following restrictions and inclusion of the applicable restrictive-use language found in paragraph (C) of exhibit A-4 of this subpart and agrees to execute the Restrictive-Use Agreement found at exhibit G-4 of this subpart:

Maintain the housing for current eligible tenants in occupancy as of the date of the prepayment for the life of the project or until the current tenants are no longer eligible for the housing under FmHA or its successor agency under Public Law 103-354 regulations, or the tenants choose to vacate of their own will. The owner will ensure the tenants will not be displaced due to a change in the use of the housing, an increase in the rental or other charges as a result of the prepayment, or a decrease in income. Existing tenants are protected to ensure that none experience new or increased rent overburden until each voluntarily moves from the project.

(iii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, and that there is an adequate supply of safe, decent, and affordable rental housing within the market area for the foreseeable future, the borrower may prepay without restrictions. The provisions of paragraph (c)(3) of this section will apply.

(2) *The loan is subject to restrictive-use provisions and the borrower agrees to continue to adhere to the provisions after prepayment.* In accordance with exhibit A-3 of this subpart, the borrower agrees to continue to maintain the housing in accordance with the restrictions already in effect. The

borrower must also agree to execute the Restrictive-Use Agreement found at exhibit G-1 to this subpart.

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206 (b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

(i) For loans not subject to restrictive-use provisions nor prohibition on prepayment, it is determined by FmHA or its successor agency under Public Law 103-354 that housing opportunities for minorities will not be materially affected as a result of the prepayment. Exhibit E of this subpart will be used to assist in making this determination.

(ii) For loans subject to restrictive-use provisions, it is determined Federal or other financial assistance provided to residents will no longer be provided, due to no fault, action or lack of action on the part of the borrower. If a borrower applies to have restrictions removed after prepayment because Federal or other financial assistance will no longer be provided, the restrictions will be released only if the loss of Federal or other financial assistance could not have been reasonably anticipated at the time of acceptance of the prepayment.

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

(4) *Projects with both LH loans and grants.* If a prepayment is accepted on an LH loan for a project which also has an LH grant, restrictive-use provisions for the project may be released only under the conditions specified in the Grant Agreement.

(5) *Documentation.* Thorough documentation of the reasons and decision to approve prepayment will be entered in the casefile and appended to the prepayment report. Any additional materials used to reach the decision will be included in the casefile.

(d) *Borrower notification of approval or disapproval of prepayment.* The Servicing Office or other designated office will notify the borrower as to whether the prepayment has been approved or disapproved within:

(1) 15 days of the borrower's rejection of an incentive offer for loans not subject to restrictive-use provisions nor prohibited from prepayment; or

(2) 60 days of a complete prepayment request by a borrower subject to restrictive-use provisions.

(e) *Processing acceptance of prepayment.* After approval of a prepayment, the following actions must be taken:

(1) *Completion of the prepayment report and notification of the National Office.* If prepayment is approved, the Servicing Office or other designated office will complete a prepayment report in the format of exhibit B of this subpart, and submit the report with all documentation on each prepaid loan to the State Director or other designated official for indefinite retention. Any information for the report supplied by the borrower must include documentation and verification by the Servicing Office. For prepayment of on-farm labor housing units, only items relevant to the on-farm units need be completed. The State Office will notify the National Office in the format of FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-1 (available in any FmHA or its successor agency under Public Law 103-354 office) indicating that the prepayment has been accepted. A copy of the prepayment report will be included in the materials forwarded to the National Office.

(2) *Notify interested agencies.* All interested agencies notified in accordance with § 1965.206 (b)(4) of this subpart will be notified of the decision to accept the prepayment.

Agencies which may aid displaced tenants will be advised of any anticipated displacement, the level at which post-prepayment rents will be set and any restrictive-use provisions which will remain in the deeds of release. Other agencies will be advised that no offer to sell will be made.

(3) *Notify tenants.* The Servicing Office will send an additional notice to tenants at least 60 days prior to the prepayment. The prepayment may not take place less than 60 days from the tenant notification or 180 days from the initial notification unless an exception is allowed in accordance with paragraph (f)(2) of this section. Tenant notices will be sent certified mail to each tenant and also posted at the project in public areas. Copies of the notice will remain posted at the project until the prepayment is accepted and all existing tenants voluntarily vacate their units. The notice and attachments will contain all of the following information appropriate for the prepayment action and any other relevant information necessary to allow tenants to make informed choices (FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-3 (available in any FmHA or its successor agency under Public Law 103-354 office) and attachments are provided as a guide for this purpose). The notice will contain the following applicable statements and information:

(i) All relevant information concerning the prepayment has been reviewed and FmHA or its successor agency under Public Law 103-354 has decided to accept the prepayment on (date).

(ii) Fully detailed reason(s) describing why the prepayment was approved. Also include the reasons for acceptance of the prepayment in less than 180 days (if applicable).

(iii) At the time of prepayment, rents are expected to be $___.

(iv) The tenant will be affected by this change on (date the tenant's current lease expires, date of the prepayment or other mandated date, whichever is later.)

(v) (The following statement should be included if the loan is being prepaid but will retain restrictive-use provisions.) All current eligible tenants may continue to occupy the housing until the tenants decide to voluntarily move, the tenants no longer meet eligibility requirements or the restrictive-use provisions expire on (insert expiration date), whichever is sooner. The rents of current eligible tenants may not be increased as a result of current owner actions to exceed levels which create new or increased rent overburden as established by FmHA or its successor agency under Public Law 103-354 regulations, in accordance with title V of the Housing Act of 1949, during the period of eligible tenant occupancy during the restricted period. However, declines in tenant income shall not require corresponding reductions in rent levels. A tenant, or those wishing to occupy the housing (if applicable), as well as the Government, may seek enforcement of the provisions. Annual income recertifications will continue to be required in order to protect eligible tenant rents. The preceding requirements are binding on the current owner and any successors in interest.

(vi) (The following statement should be included if the project has project-based section 8 rents.) Eligible tenant rents will continue to be subsidized by the Department of Housing and Urban Development (HUD) until (insert the date the section 8 contract expires). (If applicable, include the following.) If section 8 subsidies are not continued after (insert the date the section 8 contract expires), the owner of the project will continue eligible tenant rents at levels that will not create or increase rent overburden until (insert date the restrictive-use expires. However, declines in tenant income shall not require corresponding reductions in rent levels.

(vii) (The following statement should be included if project-based HUD section 8 or other subsidies will expire prior to 2 years after the prepayment.) Eligible tenants currently residing in the project who may subsequently be displaced or experience rent overburden due to the prepayment may qualify for certain protections. The following protections are available to eligible tenants who believe they have experienced displacement or rent overburden:

(A) Letters of Priority Entitlement (LOPE) to other FmHA or its successor agency under Public Law 103-354 housing. Tenants may apply for LOPES up until the day the tenants' rents are scheduled to be increased. These letters will be valid for 60 days after issuance. All LOPES will be issued in accordance with title VI of the Civil Rights Act of 1964, as codified in subpart E of part 1901 of this chapter.

(B) Tenants currently receiving rental assistance (RA) will be able to continue to receive RA if they move to other FmHA or its successor agency under Public Law 103-354 financed housing in which they are eligible for RA.

(C) Tenants choosing to stay in their units after prepayment and pay higher rents, with or without Federal, State or other subsidy, are entitled to do so, unless evicted for a cause unrelated to prepayment.

(viii) Eligible tenants residing in prepaying projects will also be sent:

(A) A list of project names, locations, number of apartments, senior citizen or family designation, and unit sizes of other FmHA or its successor agency under Public Law 103-354 projects in the market area.

(B) The names and locations of other subsidized housing; and

(C) Addresses and telephone numbers of the applicable HUD area office, and other agencies which administer housing subsidies or aid in relocation anywhere in the market area.

(ix) Tenants will be allowed to review the information used to make any of the determinations regarding acceptance of the prepayment, prepayment rent increases and alternatives to prepayment.

(4) *Issue LOPEs.* Upon request by a tenant for an LOPE, the Servicing Official will prepare the letter and forward the letter to the tenant (FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-4 (available in any FmHA or its successor agency under Public Law 103-354 office) may be used as a guide). The LOPE, which is to be addressed to FmHA or its successor agency under Public Law 103-354 borrowers, will include:

(i) A tenant with an LOPE has 60 days to apply in writing to other FmHA or its successor agency under Public Law 103-354 projects in any location in the country.

(ii) A tenant with an LOPE is to be placed at the top of all waiting lists in FmHA or its successor agency under Public Law 103-354 projects applied to, which have appropriate units the tenant qualifies for. Such tenants will follow only those tenants with LOPES who were previously placed on the waiting list. Handicapped tenants on the list for handicapped units which have appropriate design features will maintain priority over non-handicapped tenants with LOPEs.

(iii) The tenant will not be removed from the priority position on the waiting list until the tenant moves to a unit utilizing an LOPE or is purged from the waiting list in accordance with exhibit B or subpart C of part 1930 of this chapter.

(iv) If the tenant holding the LOPE is receiving RA in the prepaying project, and uses the LOPE to move to a Plan II project for which the tenant would qualify for RA, the RA will be transferred to the project to which the tenant moves. The RA will be reassigned to that tenant without competition. RA brought to a project by a tenant from a prepaying project will remain at the receiving project if the

tenant subsequently moves to another FmHA or its successor agency under Public Law 103-354 project.

(v) If the tenant's current security deposit of (a specified amount) has not been released by the prepaying project by the date a tenant moves, the new landlord will be encouraged to defer collection of the new security deposit until the tenant's current deposit is refunded, even if the date of release is after the date the tenant occupies the new unit.

(5) *Approval of tenant leases.* Prior to accepting the prepayment, the Servicing Office will also review and approve a modified tenant lease to be used for all protected tenants during any applicable restrictive-use period. This lease will explain the restrictive-use provisions, who is protected, describe the limits on rents during the period of restrictions, explain that no tenant can have a lease renewal denied for other than "good cause" (which cannot include income level), that charges, rules and regulations, and services may not change substantially from those applicable at present, and explain all other provisions necessary to protect affected tenants including Fair Housing Act Amendment provisions. The lease shall retain provisions for annual income certification. The approved lease, with signatures of both the borrower and FmHA or its successor agency under Public Law 103-354, will be maintained by the Servicing Office until expiration of the restrictive-use period, although FmHA or its successor agency under Public Law 103-354 will not be responsible for monitoring compliance. If the owner wishes to make subsequent modifications to the lease, FmHA or its successor agency under Public Law 103-354 will review the lease to ensure that none of the modifications are contrary to the intent of this regulation.

(6) *Borrower responsibilities after prepayment.* Prior to accepting the prepayment, the Servicing Official will meet with the borrower to discuss borrower obligations under restrictive-use and fair housing provisions remaining in effect after the prepayment is accepted. The Servicing

Official will review the applicable restrictive-use requirements, if any, in detail with the borrower. In particular, the Servicing Official will explain that the applicable provisions of subpart C of part 1930 of this chapter specific to tenant rights and relations shall remain in effect during the restrictive-use period. Owners of prepaid projects will be responsible for ensuring that rental procedures, verification and certification of income and/or employment, lease agreements, rent or occupancy charges, and termination and eviction remain consistent with the provisions set forth in subpart C of part 1930 of this chapter, and also adhere to applicable local, State, and Federal laws. The borrower will be informed that it is the borrower's responsibility to obtain FmHA or its successor agency under Public Law 103-354 concurrence with any changes to the preceding rental procedures that may deviate from those approved at the time of the prepayment prior to implementing the changes. Any changes proposed must be consistent with the objectives of the program and the regulations. Documentation, including annual income recertifications, shall be maintained to evidence compliance in the event there is a future complaint or audit. The former borrower must be able to document that acceptable waiting lists were maintained, units were rented to appropriate tenants, and rents were established at appropriate levels in accordance with the applicable restrictive-use provisions. The former borrower must also agree to make the documentation available for Government inspection upon request. The former borrower and any successors in interest will be required to provide the following signed and dated certification to the applicable Servicing Office or other designated office within 30 days of the beginning of each calendar year for the full period of the restrictive-use provisions:

(Name of owner) certifies that (name of project) is being operated in compliance with the restrictive-use provisions contained in (applicable release document) and the Restrictive-Use Agreement which set forth certain requirements for operation of the project for the benefit of low- and moderate-income people in conformance with applicable FmHA or its successor agency under Public Law 103-354 regulations (Name of borrower) understands that failure to operate the project in conformance with the restrictive-use provisions may cause a tenant or the Government to seek enforcement of the provisions.

The borrower must also agree to execute the applicable Restrictive-Use Agreement found at exhibits G-1 thru 4 to this Subpart.

(7) *Servicing Office responsibilities after prepayment.* Upon prepayment, the Servicing Office will send a notice to all tenants informing the tenants of the acceptance of the prepayment. The borrower will be notified that a copy of the notice must be posted and maintained in public areas in the project until all restrictive-use provisions expire. FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-5 (available in any FmHA or its successor agency under Public Law 103-354 office) will be used for the notice. The Servicing Office or other designated office will monitor receipt of the certification referred to in paragraph (e)(6) of this section and maintain case files on the prepaid project until such time as the restrictive-use provisions expire. The Servicing office or other designated office will take such actions as necessary to follow-up on receipt of the annual certifications from each prepaid borrower. If the Servicing Office is unable to obtain borrower cooperation, the Servicing Office shall refer the case to the State Office for transmittal to the National Office for further servicing guidance and/or enforcement actions.

(8) *Payment in full and release of security.* Prior to releasing security instruments, FmHA or its successor agency under Public Law 103-354 must be certain that full payment has been received. Security Instruments will be released in accordance with § 1965.90 (b) of subpart B of part 1965 of this chapter.

(9) *Sale to nonprofit organization or public agency at end of restrictive-use period.* Borrowers who are subject to the restrictive-use provisions contained in paragraph (A) or (B) of exhibit A-4 of this subpart are required to attempt to sell the project to a nonprofit organization or public agency at the end of the restrictive-use period. Advertising the project for sale will be carried out in the same manner and time period as required for sale to nonprofits or public agencies within the program as stated in § 1965.216 (b), (c), and (d) of this subpart. Advertising will be conducted for a minimum of 180 days beginning at least 6 months prior to the expiration of the restrictive-use period. If 6 months do not remain between the date of prepayment and the end of the restrictive-use period the project will be advertised for sale for a minimum of 180 days.

(f) *Denial, postponement, waiver, or withdrawal of prepayment request*–(1) *Denial of prepayment request.* Borrowers for whom there is no prohibition on prepayment will be denied a request to prepay if the conditions required for prepayment stated in paragraph (c) of this section and exhibit E of this subpart cannot be met, or if information submitted with the prepayment request to prepay, the Servicing Official will send a letter to the borrower stating the reasons for the denial and the right to appeal the rejection, in accordance with subpart B of part 1900 of this chapter and §§ 1965.213 and 1965.215 and exhibits D and E of this subpart. The letter denying the prepayment request may revise the original incentive offer if new information documenting the loss the borrower may suffer if not allowed to prepay has been brought to the attention of the Servicing

Office. If a letter is sent offering a revised incentive, rights to appeal the denial will not be included.

(2) *Postponement of prepayment requests.* Prepayment requests will be denied if the request was received less than 180 days in advance of the project prepayment date unless the Servicing Office determines that there is sufficient time to consider tenant comments, verify information submitted with the prepayment report, and verify that all tenant leases are extended for a 180-day period from the date of the prepayment request and include current rents and conditions. Prepayment will be postponed if necessary to allow sufficient time for the second tenant notification to be sent at least 60 days prior to the prepayment, unless all tenant leases are extended to the end of the 60 days, and at least 30 days has passed since the first notification letters were sent. The extension of tenant leases does not substitute for the insertion of restrictive-use provisions in the release documents or for allowing sufficient time for tenant comments.

(3) *Withdrawal or cancellation of prepayment requests.* Prepayment authorization will be cancelled if the prepayment is not received within 180 days of the final approval of the prepayment.

(g) *Borrower appeals of prepayment disapproval.* The borrower may appeal the decision to deny prepayment without restrictive-use provisions within 30 days of the receipt of the rejection, in accordance with subpart B of part 1900 of this chapter. The incentive offer may be appealed at the same time if the borrower chooses. Tenants will be notified if a borrower appeal is pending, given the right to send written testimony to the appeal officer, and have one representative at the appeal hearing. If the decision to deny prepayment is upheld or the incentive offer is modified, the borrower will be given an additional 30 days to respond to the incentive offer. Based upon the borrower response and whether the loan is subject to restrictive-use provisions, the

Servicing Office will act in accordance with appropriate sections of this subpart. Borrowers subject to restrictive-use provisions will not be granted appeal rights.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

---

(1) DUBLIN PLAZA, INC., A CORPORATION
P.O. Box 1032
Pulaski, Virginia 24301

(2) EASTWOOD APARTMENTS, A LIMITED PARTNERSHIP
2401 Southbend Road
Edmond, Oklahoma 73034

(3) EVERGREEN MANOR ASSOCIATES, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(4) FOX RIDGE PHASE II, A LIMITED PARTNERSHIP
P.O. Box 1032
Pulaski, Virginia 24301

(5) FRANCONIA ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(6) MARILYN GRAHAM
5396 Bear Drive
Evergreen, Colorado 80439

(7) GREENWAY OF ALTOONA ASSOCIATES, PHASE I, A LIMITED PARTNERSHIP

FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT AND JUST COMPENSATION

File No. 97-381C
(Judge Reginald W. Gibson)

c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(8) GREENWAY OF ALTOONA ASSOCIATES, PHASE II, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(9) GREENWAY OF NEWTON ASSOCIATES, PHASE I, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(10) DAVID A. HODGES, SR.
c/o Hodges Development Corp.
201 Loudon Road
Concord, New Hampshire
03301

(11) DAVID A. HODGES, SR. AND JOANNE M. HODGES
c/o Hodges Development Corp.
201 Loudon Road
Concord, New Hampshire
03301

(12) PHOEBE J. PERRI
23 Hickory Hollow Drive
Madison, Wisconsin 53705

(13) PINE NEEDLES
APARTMENTS, A LIMITED
PARTNERSHIP
932 Hendersonville Road
Asheville, North Carolina
28803

(14) PRAIRIE VILLAGE OF
ADEL ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(15) PRAIRIE VILLAGE OF
ALTOONA ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(16) PRAIRIE VILLAGE OF
GRIMES ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(17) PRAIRIE VILLAGE OF
HUXLEY ASSOCIATES,
A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(18) PRAIRIE VILLAGE OF
LAPORTE CITY
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(19) PRAIRIE VILLAGE OF
PARKERSBURG
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(20) PRAIRIE VILLAGE OF
SLATER ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(21) PRAIRIE VILLAGE OF
STATE CENTER
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(22) R.C. GETTY APARTMENTS,
A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota
57101

(23) R.C. MO APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(24) R.C. PIERRE APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(25) R.C. SPRINGS APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(26) SCENIC VALLEY, ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(27) TIMBERBROOK PROPERTIES, A GENERAL PARTNERSHIP
10407 Reclinata Lane
Tampa, Florida 33618

(28) TUCKER PROPERTIES, A LIMITED PARTNERSHIP
P.O. Box 100
Carbondale, Kansas 66414

(29) TUCKER PROPERTIES II, A LIMITED PARTNERSHIP
P.O. Box 100
Carbondale, Kansas 66414

(30) VALLEY ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(31) BRIAN E. WELLS
3210 Heatherdell Lane
Madison, Wisconsin 53713

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

For their Complaint against the defendant United States of America, plaintiffs state and allege as follows:

PRELIMINARY ALLEGATIONS

1. Each of the plaintiffs contracted with the United States of America ("the Government") for a loan to provide rental housing for low- and moderate-income persons ("the housing programs"). The Government entered into these contracts ("the contracts") with plaintiffs by and through its agency, the Farmers Home Administration, United States Department of Agriculture ("FmHA").

2. While the precise terms of these contracts vary, all of them permitted each contracting plaintiff to terminate its participation in the Government's housing programs "at the option" of plaintiff upon prepayment of each housing project's federally made or insured mortgage. Pursuant to the contracts, said optional termination rights could be exercised by plaintiffs "at any time" prior to the termination of the forty (40) or fifty (50) year terms of their contracts.

3. Congress in 1992 enacted legislation that purports to permanently repudiate the Government's contractual obligation to permit FmHA contract holders to terminate their contracts at any time at their option. As is alleged more fully below, plaintiffs contend in this action that the enactment of the 1992 legislation anticipatorily repudiates the contract between defendant and each of the plaintiffs. As is their right, plaintiffs have elected to treat the Government's anticipatory repudiation as a breach of contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would achieve its option of terminating its contract but for the Government's repudiation. Plaintiffs also allege that said legislation results in a taking of each plaintiff's property without just compensation.

4. Plaintiffs seek to recover in this auction the damages they have suffered and continue to suffer as a result of the breaches by the Government of plaintiffs' contracts and for just compensation for the taking of their properties.

(Pre-1979 FmHA Contracts)

5. Plaintiffs that entered into FmHA contracts before December 21, 1979 ("the pre-1979 FmHA contracts"), are contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time. Such a prepayment would enable such plaintiffs to "go to market" and use or dispose of their property by either (i) raising the property's rents to

commercial rates; or (ii) selling the property for its commercial fair market value.

6. The 1992 legislation described below made permanent certain emergency interim measures repudiating the contractual right of pre-1979 FmHA contract holders to terminate their contracts at any time at their option.

(Post-1979 FmHA Contracts)

7. Plaintiffs that entered into FmHA contracts on or after December 21, 1979 ("the post-1979 FmHA contracts"), also are contractually entitled to exercise their option to prepay at any time. However, by their terms all post-1979 FmHA contracts are subject to a fifteen (15) or twenty (20) year restrictive use clause. This clause is binding upon the owners and their successors in interest and requires that the property be operated as low-rent housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

8. Accordingly, if a holder of a post-1979 FmHA contract intends to terminate its contract and raise its property's rents to commercial rates it must wait until on or after the end of the fifteen (15) or twenty (20) year period from the origination date of its mortgage loan to do so. Alternatively, if the holder of such a contract intends to terminate its contract and sell its property to a third party who will retain low rents for the remainder of the fifteen (15) or twenty (20) year period commencing upon loan origination, such a contract holder is contractually entitled to exercise its termination right and go to market at any time.

9. The 1992 legislation described below extended to post-1979 FmHA contract holders the interim measures that had repudiated the contractual termination right of pre-1979 FmHA contract holders, and made such measures permanent.

THE PARTIES
(Parties Plaintiff)

10. Each of the plaintiffs is a general or limited partnership, a corporation, an individual, or other legal entity which entered into a contract with FmHA for a loan to provide rental housing for low- and moderate-income residents meeting Government eligibility standards.

Rule 20(a) List

11. Pursuant to Rule 20(a) of the Rules of the Court of Federal Claims, the following comprises an alphabetized, numbered list of all said plaintiffs. The plaintiffs entered into contracts categorized by the Government as either a pre-1979 or a post-1979 contract:

1. Dublin Plaza, Inc., a corporation with an address at P.O. Box 1032, Pulaski, Virginia 24301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Plaza Apartments, consisting of thirty-six (36) units.

2. Eastwood Apartments Limited Partnership, with an address at 2401 Southbend Road, Edmond, Oklahoma 73034, entered into one contract for three post-1979 loans for rental housing at the following project known as:

(i) Eastwood Apartments, consisting of forty-eight (48) units.

3. Evergreen Manor Associates, a Limited partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Evergreen Manor of Waukee, Phase I, consisting of sixteen (16) units; and

(ii) Evergreen Manor of Waukee, Phase II, consisting of sixteen (16) units.

4. Fox Ridge Phase II, a Limited Partnership, with an address at P.O. Box 1032, Pulaski, Virginia 24301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Fox Ridge Apartments, consisting of sixty (60) units.

5. Franconia Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Riverfront Apartments, consisting of twenty (20) units; and

(ii) Sunrise River Apartments, consisting of sixteen (16) units.

6. Marilyn Graham, with an address at 5396 Bear Drive, Evergreen, Colorado 80439, entered into three contracts for three pre-1979 loans for rental housing at the following projects known as:

(i) Rancho Verde Apartments, consisting of twenty-four (24) units;

(ii) Casa Grande I Apartments, consisting of thirty-two (32) units; and

(iii) Casa Grande II Apartments, consisting of thirty-two (32) units.

7. Greenway of Altoona Associates, Phase I, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Greenway of Altoona, Phase I, consisting of twenty-eight (28) units.

8. Greenway of Altoona Associates, Phase II, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa

50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Greenway of Altoona, Phase II, consisting of twenty (20) units.

9. Greenway of Newton Associates, Phase I, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Greenway of Newton I, consisting of twenty-eight (28) units.

10. David A. Hodges, Sr., with an address at c/o Hodges Development Corp., 201 Loudon Road, Concord, New Hampshire 03301, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Deer Run Apartments, consisting of twenty-five (25) units; and

(ii) Beechwood Apartments, consisting of fifty (50) units.

11. David A. Hodges, Sr. and Joanne M. Hodges, with an address at c/o Hodges Development Corp., 201 Loudon Road, Concord, New Hampshire 03301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Pinetree Apartments, consisting of fifty (50) units.

12. Phoebe J. Perri, with an address at 23 Hickory Hollow Drive, Madison, Wisconsin 53705, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Palmyra Park Apartments I, consisting of twenty-four (24) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Palmyra Park Apartments II, consisting of sixteen (16) units.

13. Pine Needles Apartments, a Limited Partnership, with an address at 932 Hendersonville Road, Asheville, North Carolina 28803, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Pine Needles Apartments, consisting of forty-six (46) units.

14. Prairie Village of Adel Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Prairie Village of Adel, consisting of twenty-four (24) units.

15. Prairie Village of Altoona Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Altoona, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Altoona, Phase II, consisting of twelve (12) units.

16. Prairie Village of Grimes Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Grimes, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Grimes, Phase II, consisting of sixteen (16) units.

17. Prairie Village of Huxley Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered

into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Huxley, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Huxley, Phase II, consisting of eight (8) units.

18. Prairie Village of LaPorte City Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Prairie Village of LaPorte City, Phase I, consisting of twenty-four (24) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Prairie Village of LaPorte City, Phase II, consisting of eight (8) units.

19. Prairie Village of Parkersburg Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Prairie Village of Parkersburg, consisting of thirty-two (32) units.

20. Prairie Village of Slater Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Slater, Phase I, consisting of twenty (20) units; and

(ii) Prairie Village of Slater, Phase II, consisting of eight (8) units.

21. Prairie Village of State Center Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa

50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Prairie Village of State Center, consisting of twenty-four (24) units.

22. R. C. Getty Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Getty Apartments, consisting of sixteen (16) units.

23. R.C. Mo Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Mo Apartments, consisting of thirty-two (32) units.

24. R. C. Pierre Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Pierre Apartments, consisting of forty (40) units.

25. R. C. Springs Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Springs Apartments, consisting of forty (40) units.

26. Scenic Valley Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into one pre-1979 contract for one pre-1979 loan for rental housing at the following project known as:

(i) Scenic Valley Apartments, consisting of twenty-four (24) units.

27. Timberbrook Properties, a General Partnership, with an address at 10407 Reclinata Lane, Tampa, Florida 33618, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Timberbrook Apartments, consisting of twenty (20) units.

28. Tucker Properties, a Limited Partnership, with an address at P.O. Box 100, Carbondale, Kansas 66414, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Valley View Village, consisting of sixteen (16) units.

29. Tucker Properties II, a Limited Partnership, with an address at P.O. Box 100, Carbondale, Kansas, 66414, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Dogwood Glen, consisting of twenty-four (24) units.

30. Valley Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Rolling Hills Apartments, consisting of forty-eight (48) units.

31. Brian E. Wells, with an address at 3210 Heatherdell Lane, Madison, Wisconsin 53713, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Fall River I, consisting of sixteen (16) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Fall River II, consisting of eight (8) units.

(Party Defendant)

12. FmHA is an agency of the defendant. At all times relevant to the allegations in this Complaint, FmHA and its

respective officials and employees were acting as agents of the defendant. Pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 233, 108 Stat. 3178 (1994), the Secretary of the Department of Agriculture was authorized to establish a successor agency to Farmers Home Administration known as Rural Housing and Community Development Services ("RHCDS"). Effective January 30, 1996, RHCDS changed its name to Rural Housing Service ("RHS"). (Agency Name Change, 61 Fed. Reg. 2899 (1996).) RHS is itself part of the area within the Department of Agriculture known as "Rural Development." As used herein, "FmHA" shah refer to Farmers Home Administration or its successor agencies, as appropriate.

13. An actual controversy exists between the parties.

JURISDICTION

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491.

BACKGROUND

15. Prior to the 1960s, Congress sought to provide low-income housing primarily by subsidizing projects developed, owned, and managed by local government public housing authorities. During the 1960s and the 1970s, Congress changed its approach and enacted legislation to encourage private developers to construct, own, and manage large numbers of federally assisted housing units for low- and moderate-income residents.

16. In furtherance of this changed approach, Congress authorized FmHA to make or insure loans to private entities in order to stimulate the private development of federally assisted housing for low- and moderate-income and elderly residents in rural areas of the United States. Congress began this program in 1962 by adding Sectio 515 to the Housing

Act of 1949 (Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962)) and expanded its scope in 1968 by adding Section 521 to that Act (Pub. L. No. 90-448, Tit. X, § 1001, 82 Stat. 551 (1968))(now codified at 42 U.S.C. §§ 1485 and 1490a, respectively). Housing projects subject to Sections 515 and/or 521 of the Housing Act of 1949 are referred to herein as "FmHA projects."

17. Each of the plaintiffs (or their predecessors-in-interest) owning FmHA projects agreed, under Sections 515 and/or 521 of the Housing Act of 1949, as amended, 42 U.S.C. §§ 1485 and 1490a, to construct, rehabilitate, or improve housing projects and to enter into Loan Agreements with FmHA. The Loan Agreements, *inter alia*, imposed significant obligations on plaintiffs regarding the tenants to whom plaintiffs could rent, the rents they could charge, the profits they could receive, and the maintenance and financial operation of each project ("the low income affordability restrictions").

18. Contemporaneous with the execution of the Loan Agreement, and referenced therein, each plaintiff (or its predecessor-in-interest) owning an FmHA project executed, *inter alia*, a Promissory Note and Real Estate Mortgage. In executing the Promissory Note, each plaintiff promised to pay to the order of the Government, in scheduled installments, the entire principal due pursuant to the Loan Agreement, together with interest at a specified rate. The Promissory Note provided, *inter alia*, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower."

19. By signing the Loan Agreements and the Promissory Notes referenced therein, plaintiffs promised, *inter alia*, (i) to construct and maintain housing in accordance with FmHA's specifications; (ii) to use their FmHA projects for the purpose of housing people eligible for occupancy as provided by Section 515 and appropriate FmHA regulations; (iii) to charge no higher rents than those permitted by

FmHA; (iv) to make timely payments on their mortgages; and (v) to maintain certain cash reserves. In exchange, the Government agreed to allow plaintiffs to free themselves of FmHA's regulatory strictures in accordance with the contractual provisions of the Promissory Notes subject to FmHA's present regulations and to its future regulations not inconsistent with the express provisions of the Notes.

20. The Loan Agreements obligate the plaintiffs to operate their housing projects in accordance with FmHA regulatory strictures only so long as plaintiffs' indebtedness and other obligations under the Promissory Note, Real Estate Mortgage, and any related agreement remain unsatisfied. Thus, a plaintiff's obligation under the Loan Agreement to operate its housing project in accordance with FmHA regulations expires upon that plaintiff's prepayment in full of its indebtedness and satisfaction of any related obligations.

21. Consistent with the language of the Promissory Note, FmHA regulations codified at, *inter alia*, parts 1865, 1866, and 1965, implementing Section 502 of the Housing Act of 1949, 42 U.S.C. § 1472, permitted plaintiffs to prepay their mortgages at any time at their option, so long as they and their successors in interest continued to comply with the restrictive-use clause, if any, contained in the Real Estate Mortgage.

22. Accordingly, plaintiffs were entitled under their Loan Agreements with FmHA, FmHA's regulations, and their respective Promissory Notes, to terminate their contracts by prepaying their mortgages at any time at their option to enable them to go to market and maximize their return on investment.

23. Notwithstanding plaintiffs' contractual right to terminate their participation in the Government's housing programs, the Government permanently repudiated its obligation to recognize plaintiffs' right by enacting the 1992 legislation described below.

CONGRESSIONAL ACTION

The 1988 Legislation

24. On February 5, 1988, Congress imposed emergency interim measures repudiating the right of pre-1979 FmHA contract holders to exercise their contractual termination right at any time at their option by enacting Title II of the Housing and Community Development Act of 1987. (Pub. L. No. 100-242, 101 Stat. 1877 (1988), cited as the Emergency Low Income Housing Preservation Act of 1987 (codified as amended at 42 U.S.C. § 1472(c) and 12 U.S.C. § 1715l note)("the 1988 legislation" or "ELIHPA").) Congress made certain findings in the 1988 legislation, including but not limited to the following:

> (i) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 i.e., FmHA housing units] are threatened with loss as a result of the prepayment of mortgages by owners;
> (ii) the loss of this privately owned and federally assisted housing would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing;
> (iii) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations;
> (iv) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

The 1988 legislation, Section 202(a) (emphasis supplied).

(The 1988 Legislation's Interim Measures For Pre-1979 FmHA Contracts)

25. Congress estimated that a large portion of the 367,000 units owned by both pre-1979 and post-1979 loan holders and originating between 1963 and 1985 were vulnerable to being prepaid during the few years following 1988. However, post-1979 FmHA loan holders, which unlike pre-1979 loan holders already were contractually required to maintain their projects as low- and moderate-income housing for fifteen (15) or twenty (20) years, were the subject of continuing reviews of alternative responses to the perceived imminent loss of affordable housing. Thus, until such time as Congress could act on recommendations and devise a permanent solution for all FmHA loans, the 1988 legislation temporarily confined itself to dealing only with the pre-1979 FmHA loans, i.e., those FmHA loans originating from 1963 to 1979.

26. The 1988 legislation constituted an interim measure designed to temporarily place the pre-1979 FmHA contract holders "on the same playing field" as the post-1979 FmHA contract holders already subject to a restrictive-use clause. For example, a pre-1979 FmHA contract holder could avoid an immediate forced sale of its project by agreeing to extend its low-income use for a period of not less than twenty (20) years from the date of loan origination. The 1988 Legislation, Section 241.

27. Although denominated as an "interim measure," the 1988 legislation specifically amended existing law -- Section 502(c) of the Housing Act of 1949 -- and did not contain a sunset provision. Congress did not revisit this issue and devise a permanent response for all FmHA loans, including those post-1979 loans with contractual termination rights, until 1992.

28. Consistent with the provisions of existing post-1979 FmHA contracts containing restrictive-use clauses, the interim measures of the 1988 legislation temporarily

recognized the contractual right of post-1979 FmHA loan holders to terminate their contracts by prepaying their loans at any time at their option provided that the projects were maintained as low- and moderate-income housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

29. Contrary to the provisions of pre-1979 FmHA contracts, the interim measures of the 1988 legislation repudiated the contractual right of said contract holders to terminate their contracts at any time at their option. The 1988 Legislation, Section 241.

The 1992 Legislation

30. On October 28, 1992, Congress amended Section 502(c) of the Housing Act of 1949 by enacting the Housing and Community Development Act of 1992 (Pub. L. No. 102-550, § 2 & Tit. VII, § 712, 106 Stat. 3681, 3841 (1992)(codified in relevant part at 42 U.S.C. § 1472(c))("the 1992 legislation or Title VII").) This amendment eliminated the interim measure status of the 1988 legislation's emergency provisions repudiating the contractual right of pre-1979 FmHA loan holders to terminate their contracts at any time at their option.

31. In addition to making permanent the temporary repudiation of the contractual termination rights of pre-1979 FmHA loan holders, the 1992 legislation extended said repudiation to those post-1979 FmHA loan holders with the same contractual rights. (42 U.S.C. § 1472(c)(4)(A), as amended.) Thus, the 1992 legislation, signed into law by the President on November 2, 1992, together with implementing regulations, repudiates the contractual termination right of any FmHA loan holder who chooses to terminate its contract.

32. Pursuant to the 1992 legislation, holders of both pre-1979 and post-1979 FmHA contracts are permitted to terminate their contracts by prepaying their loans only in accordance with specified, non-contractual restrictions,

including but not limited to the requirement that, before accepting any offer to prepay, the Secretary must make reasonable efforts to enter into an agreement to extend the low-income use of FmHA projects for not less than a period of twenty (20) years beginning on the date the agreement is executed. The 1992 Legislation, Section 712, 42 U.S.C. § 1472(c)(4)(A).

33. The 1992 legislation authorizes FmHA, subject to various conditions and at its discretion, to offer limited, specified "incentives" to holders of FmHA contracts which, along with the threat of the forced property sales discussed below, are designed to induce said contract holders to extend the low-income use of their projects. In general, the incentives allowed owners whose projects satisfied various guidelines to apply for: (i) increases in the rate of return on investment; (ii) reductions of the interest rate on the mortgage loan; (iii) additional rental assistance; and (iv) an equity loan. 42 U.S.C. § 1472(c)(4)(B).

34. The appraisal guidelines used, by FmHA to determine incentives are inconsistent with standard appraisal guidelines and result in value determinations below fair market value.

35. For those FmHA project owners unwilling or unable to extend their participation in the Government's housing programs by acquiescing to the "incentives" outlined above, the 1992 legislation provides for forced sales of said owners' properties to nonprofit organizations or public agencies approved by FmHA which are required to maintain the projects as low income housing, subject to FmHA's approval of financial assistance to the prospective purchasers. Under the lengthy, cumbersome, and costly procedures required, such owners are required to offer their properties for sale to such purchasers for an extended period without receiving "incentives" or any other compensation. 42 U.S.C. § 1472(c)(5)(A) - (F).

36. Such forced sale proceedings can be avoided only if (i) the FmHA project owner agrees to continue to operate its project as low-income housing for a period determined by the Secretary, but not less than twenty (20) years from the date of loan origination, and to subject itself to the forced sale proceeding at the end of that period; or (ii) if the Secretary determines that housing opportunities for minorities will not be materially affected as a result of the prepayment and that either (a) tenants will not be displaced; or (b) there is an adequate supply of affordable rental housing within the market area of the housing that is assured of being made available to all current tenants. 42 U.S.C. § 1472(c)(5)(G).

Material Terms

37. Plaintiffs' contractual right to terminate their contracts at any time at their option was a material term of their contracts. In the absence of this contractual termination right, plaintiffs would not have entered into their contracts with FmHA. But for the 1992 legislation permanently repudiating plaintiffs' contractual termination right, plaintiffs would achieve their option of terminating their contracts on those dates that would maximize their investment return on their properties, or on such other dates as they deem appropriate given their individual circumstances.

38. Plaintiffs have complied fully and in good faith in all material respects with the terms and conditions of their contracts and have otherwise fully performed their undertakings in connection therewith.

THE IMPACT OF THE 1992 LEGISLATION UPON PLAINTIFFS

39. The statutory scheme under the 1992 legislation and FmHA's implementing regulations repudiate the contractual right of FmHA project owners to terminate their contracts at

any time at their option in part by (i) compelling them to extend the low-income use of their projects; and (ii) subjecting them to forced sales of their properties. The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, i.e., the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's repudiation. Thus, the Government's scheme constitutes an anticipatory repudiation of the plaintiffs' contractual termination right.

40. The 1992 legislation complained of herein also results in a taking of plaintiffs' property for public use without just compensation. By requiring plaintiffs to house low-income tenants and to accept new low-income tenants, the Government has (i) conscripted plaintiffs' properties for public use; (ii) physically invaded or authorized others to physically invade plaintiffs' properties; and (iii) deprived plaintiffs of their distinct investment-backed expectations with regard to their properties, all without providing any just compensation.

DAMAGES

41. As a consequence of the Government's conduct, certain plaintiffs have submitted applications for prepayment and/or an offer of incentives from the Government. The Government has in every instance refused to accept prepayment from plaintiffs pursuant to the provisions of their contracts. Some plaintiffs have been compelled to change their position to their detriment in reliance upon the Government's repudiation, including accepting incentives and transferring their properties to third parties in lieu of a sale at fair market value. In light of the Government's repudiation, other plaintiffs have foregone submitting any prepayment application because of the futility of doing so.

42. As a consequence of the Government's conduct, certain plaintiffs have met with, or otherwise made inquiries of, FmHA officials regarding prepayment of their loans. Said Government officials have repeatedly represented to plaintiffs that prepayment will not be accepted. In some cases, Government officials have stated that it is not worthwhile even to file a prepayment application. Further, Government officials who are in positions of authority, trust, and confidence with respect to plaintiffs have represented to plaintiffs that they do not have and never had a contractual right to prepayment, that their contracts were subject to all future regulatory changes, including prepayment prohibitions, and have made various other misrepresentations and misstatements of fact.

43. In addition, during the period of emergency interim measures described above, Government officials led certain plaintiffs to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions.

44. The incentives potentially provided by the 1992 legislation and implementing regulations fall far short of compensating plaintiffs for the damages they have suffered and will continue to suffer as a result of the Government's repudiation of its contracts with plaintiffs, and would not provide just compensation to plaintiffs for the taking of their property for public use.

45. FmHA has acted arbitrarily and capriciously and not in accordance with law by failing to promulgate regulations and appraisal guidelines that justly compensate plaintiffs for the damages they have suffered and for the taking of their property for public use.

46. As a result of the Government's repudiation of their contractual termination right, plaintiffs have been (i) deprived of their right to use or dispose of their property as they see fit; (ii) compelled to allow the Government to use or

authorize others to purchase and use their property to fulfill the Government's undertaking to provide low cost rental housing to a segment of the public meeting Government eligibility standards; and (iii) required to continue to comply with the costly restrictions and obligations imposed upon them by their Loan Agreements.

47. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and selling their properties to third parties. The Government has deprived and will deprive these plaintiffs of earnings on the sales of their properties because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any sale, from taking place.

48. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and converting their properties into commercial housing in which they could obtain rents at market rates in excess of the rents chargeable to low- and moderate-income tenants under the Government's programs. The Government has deprived and will deprive these plaintiffs of the value of increased rents they would receive because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any increase in rents, from taking place.

49. All plaintiffs have suffered other, additional damages including without limitation (i) diminutions in the fair market value of their properties as a direct and proximate result of the Government's repudiation of plaintiffs' contractual termination right and the extended restrictions on the profitable use of their properties; (ii) the costs associated with continuing to operate under and comply with rules and regulations associated with the Government's housing programs; and (iii) the lost opportunity costs associated with investment and business opportunities plaintiffs have been foreclosed from pursuing

by virtue of their inability to exercise their contractual right to terminate their contracts at any time at their option.

COUNT ONE

(Breach of Contract)

50. Plaintiffs incorporate paragraphs 1 through 49 by reference as if fully set forth herein.

51. Defendant's 1992 legislation anticipatorily repudiated the contract between the defendant and each of the plaintiffs. The Government's anticipatory repudiation has deprived and will deprive each plaintiff of its contractual right to terminate its contract at any time at its option before the expiration date of its forty (40) or fifty (50) year contract term. The Government's anticipatory repudiation constitutes a breach of each plaintiff's contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation.

52. As a direct and proximate result of defendant's conduct, plaintiffs have been damaged in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

COUNT TWO

(Just Compensation)

53. Plaintiffs incorporate paragraphs 1 through 52 by reference as if fully set forth herein.

54. As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use and requires payment to

plaintiffs of just compensation under the Fifth Amendment to the U.S. Constitution.

55. Plaintiffs are entitled to just compensation for the taking of their properties in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

AS TO COUNT ONE

1. That the Court award plaintiffs monetary relief for the damages suffered to date and for the damages plaintiffs continue to suffer as a result of defendant's breaches of plaintiffs' contracts, in an amount to be determined at trial.

AS TO COUNT TWO

2. That the Court award plaintiffs just compensation during the period during which plaintiffs' properties have been taken for public use by defendant, in an amount to be determined at trial.

AS TO ALL COUNTS

3. That the Court award plaintiffs their attorneys' fees and expenses as allowed pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c), and other applicable law.

4. That the Court award plaintiffs their costs and interest as allowed by law.

5. That the Court grant such other and further relief as the law and the evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

Dated: June 25, 1997

By: /s/_____
Jeff H. Eckland
Attorney for Plaintiffs

FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 336-3000
Telecopy: (612) 336-3026

Of Counsel:
William L. Roberts
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 336-3000
Telecopy: (612) 336-3026

M2:20108845.01

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(1) GRASS VALLEY TERRACE, A CALIFORNIA LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

COMPLAINT FOR BREACH OF CONTRACT AND JUST COMPENSATION

(2) JEFFERSON COMMONS, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

File No._____

(3) MARGORIE W. KASSNER
1003 Mesa Drive
Douglas, Wyoming 82633

(4) EILEEN KOTHE
1714 Frank Street
Maplewood, Minnesota 55109

(5) NRCB LIMITED PARTNERSHIP
18745 NE 109th Street
Redmond. Washington 98052

(6) PETERS, WILLIAMS & KUBOTA, A GENERAL PARTNERSHIP
1310 Wakarusa Drive
Lawrence, Kansas 66049-3845

(7) PINE NEEDLE APARTMENTS LIMITED PARTNERSHIP

Suite 201 Forest Center
932 Hendersonville Road
Asheville, North Carolina
28803-1761

(8) RIPON MANOR, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

(9) RURAL COMMUNITY BUILDERS, A LIMITED PARTNERSHIP
18745 NE 109th Street
Redmond, Washington 98052

(10) RICHARD AND BEATRICE SCHMIDTBAUER
15845 State Highway 15
Hutchinson, Minnesota 55350

(11) THE HIGHLANDS, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

(12) WATERLOO GREEN, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

For their Complaint against the defendant United States of America, plaintiffs state and allege as follows:

PRELIMINARY ALLEGATIONS

1. Each of the plaintiffs contracted with the United States of America ("the Government") for a loan to provide rental housing for low- and moderate-income persons ("the housing programs"). The Government entered into these contracts ("the contracts") with plaintiffs by and through its agency, the Farmers Home Administration, United States Department of Agriculture ("FmHA").

2. While the precise terms of these contracts vary, all of them permitted each contracting plaintiff to terminate its participation in the Government's housing programs "at the option" of plaintiff upon prepayment of each housing project's federally made or insured mortgage. Pursuant to the contracts, said optional termination rights could be exercised by plaintiffs "at any time- prior to the termination of the forty (40) or fifty (50) year terms of their contracts.

3. Congress in 1992 enacted legislation that purports to permanently repudiate the Government's contractual obligation to permit FmHA contract holders to terminate

their contracts at any time at their option. As is alleged more fully below, plaintiffs contend in this action that the enactment of the 1992 legislation anticipatorily repudiates the contract between defendant and each of the plaintiffs. As is their right, plaintiffs have elected to treat the Government's anticipatory repudiation as a breach of contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would achieve its option of terminating its contract but for the Government's repudiation. Plaintiffs also allege that said legislation results in a taking of each plaintiff's property without just compensation.

4. Plaintiffs seek to recover in this action the damages they have suffered and continue to suffer as a result of the breaches by the Government of plaintiffs' contracts and for just compensation for the taking of their properties.

(Pre-1979 FmHA Contracts)

5. Plaintiffs that entered into FmHA contracts before December 21, 1979 ("the pre-1979 FmHA contracts"), are contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time. Such a prepayment would enable such plaintiffs to "go to market" and use or dispose of their property by either (i) raising the property's rents to commercial rates; or (ii) selling the property for its commercial fair market value.

6. The 1992 legislation described below made permanent certain emergency interim measures repudiating the contractual right of pre-1979 FmHA contract holders to terminate their contracts at any time at their option.

(Post-1979 FmHA Contracts)

7. Plaintiffs that entered into FmHA contracts on or after December 21, 1979 ("the post-1979 FmHA contracts"),

also are contractually entitled to exercise their option to prepay at any time. However, by their terms all post-1979 FmHA contracts are subject to a fifteen (15) or twenty (20) year restrictive use clause. This clause is binding upon the owners and their successors in interest and requires that the property be operated as low-rent housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

8. Accordingly, if a holder of a post-1979 FmHA contract intends to terminate its contract and raise its property's rents to commercial rates it must wait until on or after the end of the fifteen (15) or twenty (20) year period from the origination date of its mortgage loan to do so. Alternatively, if the holder of such a contract intends to terminate its contract and sell its property to a third party who will retain low rents for the remainder of the fifteen (15) or twenty (20) year period commencing upon loan origination, such a contract holder is contractually entitled to exercise its termination right and go to market at any time.

9. The 1992 legislation described below extended to post-1979 FmHA contract holders the interim measures that had repudiated the contractual termination right of pre-1979 FmHA contract holders, and made such measures permanent.

THE PARTIES

(Parties Plaintiff)

10. Each of the plaintiffs is a general or limited partnership, a corporation, an individual, or other legal entity which entered into a contract with FmHA for a loan to provide rental housing for low- and moderate-income residents meeting Government eligibility standards.

Rule 20(a) List

11. Pursuant to Rule 20(a) of the Rules of the Court of Federal Claims, the following comprises an alphabetized, numbered list of all said plaintiffs. The plaintiffs entered into contracts categorized by the Government as either a pre-1979 or a post-1979 contract:

1. Grass Valley Terrace, a California Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Grass Valley Terrace, consisting of seventy (70) units.

2. Jefferson Commons, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Jefferson Commons, consisting of twenty-four (24) units.

3. Marjorie W. Kassner, with an address at 1003 Mesa Drive, Douglas, Wyoming 82633, entered into one contract for rental housing at the following project known as:

(i) Wyandot Village Apartments, consisting of forty-eight (48) units.

4. Eileen Kothe, with an address at 1714 Frank Street, Maplewood, Minnesota 55109, entered into two contracts for rental housing at the following projects known as:

(i) D&G Apartments #l, consisting of eight (8) units; and

(ii) D&G Apartments #2, consisting of eight (8) units.

5. NRCB Limited Partnership, with an address at 18745 NE 109th Street, Redmond, Washington 98052, entered into three contracts for rental housing at the following projects known as:

(i) Wishing Well I Apartments, consisting of forty (40) units;

(ii) Friendship House I, consisting of thirty-five (35) units; and

(iii) Windsor Park, consisting of thirty-two (32) units.

6. Peters, Williams & Kubota, a General Partnership, with an address at 1310 Wakarusa Drive, Lawrence, Kansas 66049-3045, entered into three contracts for rental housing at the following projects known as:

(i) Maplewood I Apartments, consisting of twelve (12) units;

(ii) Maplewood II Apartments, consisting of twelve (12) units; and

(iii) Brentwood Apartments, consisting of twenty-eight (28) units.

7. Pine Needle Apartments, Limited Partnership, with an address at Suite 201, Forest Center, 932 Hendersonville Road, Asheville, North Carolina 28803-1761, entered into one contract for rental housing at the following project known as:

(i) Pine Needle Apartments, consisting of forty-six units.

8. Ripon Manor, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Ripon Manor, consisting of thirty-two (32) units.

9. Rural Community Builders, a Limited Partnership, with an address at 18745 NE 109th Street, Redmond, Washington 98052, entered into one contract for rental housing at the following project known as:

(i) Friendship House II, consisting of twenty-nine (29) units.

10. Richard and Beatrice Schmidtbauer, with an address at 15848 State Highway 15, Hutchinson, Minnesota 55350, entered into one contract for rental housing at the following project known as:

(i) Plaza I Apartments, consisting of twelve (12) units.

11. The Highlands, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) The Highlands, consisting of eighty-eight (88) units.

12. Waterloo Green, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Waterloo Green, consisting of twenty-four (24) units.

(Party Defendant)

12. FmHA is an agency of the defendant. At all times relevant to the allegations in this Complaint, FmHA and its respective officials and employees were acting as agents of the defendant. Pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 233, 108 Stat. 3178 (1994), the Secretary of the Department of agriculture was authorized to establish a successor agency to Farmers Home Administration known as Rural Housing and Community Development Services ("RHCDS"). Effective January 30, 1996, RHCDS changed its name to Rural Housing Service ("RHS"). (Agency Name Change, 61 Fed. Reg. 2899 (1996).) RHS is itself part of the area within the Department of Agriculture known as "Rural Development." As used herein, "FmHA" shall refer to Farmers Home Administration or its successor agencies, as appropriate.

13. An actual controversy exists between the parties.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action on their own behalves and as a class action pursuant to Rule 23 of the Rules of the Court of Federal Claims on behalf of all similarly situated persons.

15. All of the criteria for class certification are met in this action, in that:

(a) Members constitute a large but manageable class;

(b) There are questions of law common to the whole class;

(c) Common legal issues override separate factual issues effecting individual members;

(d) Claims of the party plaintiffs are typical of claims of the Class;

(e) The Government has acted on grounds generally applicable to the whole Class;

(f) The claims of many claimants are so small that it is doubtful they would be otherwise pursued;

(g) The party plaintiffs adequately and fairly protect the interests of the Class without conflicts of interest;

(h) The prosecution of individual lawsuits would create a risk of inconsistent or varying adjudications;

(i) A class action in these circumstances will avoid repetitious lawsuits, provide for the more effective management of the issues, and aid a speedier and more just resolution of the claims involved.

JURISDICTION

16. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491.

BACKGROUND

17. Prior to the 1960s, Congress sought to provide low-income housing primarily by subsidizing projects developed, owned, and managed by local government public housing authorities. During the 1960s and the 1970s, Congress changed its approach and enacted legislation to encourage private developers to construct, own, and manage large numbers of federally assisted housing units for low- and moderate-income residents.

18. In furtherance of this changed approach, Congress authorized FmHA to make or insure loans to private entities in order to stimulate the private development of federally assisted housing for low- and moderate-income and elderly residents in rural areas of the United States. Congress began this program in 1962 by adding Section 515 to the Housing Act of 1949 (Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962)) and expanded its scope in 1968 by adding Section 521 to that Act (Pub. L. No. 90-448, Tit. X, § 1001, 82 Stat. 551 (1968))(now codified at 42 U.S.C. §§ 1485 and 1490a, respectively). Housing projects subject to Sections 515 and/or 521 of the Housing Act of 1949 are referred to herein as "FmHA projects."

19. Each of the plaintiffs (or their predecessors-in-interest) owning FmHA projects agreed, under Sections 515 and/or 521 of the Housing Act of 1949, as amended, 42 U.S.C. §§ 1485 and 1490a, to construct, rehabilitate, or improve housing projects and to enter into Loan Agreements with FmHA. The Loan Agreements, *inter alia*, imposed significant obligations on plaintiffs regarding the tenants to whom plaintiffs could rent, the rents they could charge, the profits they could receive, and the maintenance and financial operation of each project ("the low income affordability restrictions").

20. Contemporaneous with the execution of the Loan Agreement, and referenced therein, each plaintiff (or its predecessor-in-interest) owning an FmHA project executed,

inter alia, a Promissory Note and Real Estate Mortgage. In executing the Promissory Note, each plaintiff promised to pay to the order of the Government, in scheduled installments, the entire principal due pursuant to the Loan Agreement, together with interest at a specified rate. The Promissory Note provided, *inter alia*, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower."

21. By signing the Loan Agreements and the Promissory Notes referenced therein, plaintiffs promised, *inter alia*, (i) to construct and maintain housing in accordance with FmHA's specifications; (ii) to use their FmHA projects for the purpose of housing people eligible for occupancy as provided by Section 515 and appropriate FmHA regulations; (iii) to charge no higher rents than those permitted by FmHA; (iv) to make timely payments on their mortgages; and (v) to maintain certain cash reserves. In exchange, the Government agreed to allow plaintiffs to free themselves of FmHA's regulatory strictures in accordance with the contractual provisions of the Promissory Notes subject to FmHA's present regulations and to its future regulations not inconsistent with the express provisions of the Notes.

22. The Loan Agreements obligate the plaintiffs to operate their housing projects in accordance with FmHA regulatory strictures only so long as plaintiffs' indebtedness and other obligations under the Promissory Note, Real Estate Mortgage, and any related agreement remain unsatisfied. Thus, a plaintiff's obligation under the Loan Agreement to operate its housing project in accordance with FmHA regulations expires upon that plaintiff's prepayment in full of its indebtedness and satisfaction of any related obligations.

23. Consistent with the language of the Promissory Note, FmHA regulations codified at, *inter alia*, parts 1865, 1866, and 1965, implementing Section 502 of the Housing Act of 1949, 42 U.S.C. § 1472, permitted plaintiffs to prepay their mortgages at any time at their option, so long as they and

their successors in interest continued to comply with the restrictive-use clause, if any, contained in the Real Estate Mortgage.

24. Accordingly, plaintiffs were entitled under their Loan Agreements with FmHA, FmHA's regulations, and their respective Promissory Notes, to terminate their contracts by prepaying their mortgages at any time at their option to enable them to go to market and maximize their return on investment.

25. Notwithstanding plaintiffs' contractual right to terminate their participation in the Government's housing programs, the Government permanently repudiated its obligation to recognize plaintiffs' right by enacting the 1992 legislation described below.

CONGRESSIONAL ACTION

The 1988 Legislation

26. On February 5, 1988, Congress imposed emergency interim measures repudiating the right of pre-1979 FmHA contract holders to exercise their contractual termination right at any time at their option by enacting Title II of the Housing and Community Development Act of 1987. (Pub. L. No. 100-242, 101 Stat. 1877 (1988), cited as the Emergency Low Income Housing Preservation Act of 1987 (codified as amended at 42 U.S.C. § 1472(c) and 12 U.S.C. § 1715*l* note)("the 1988 legislation" or "ELIHPA").) Congress made certain findings in the 1988 legislation, including but not limited to the following:

> (i) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 [i.e., FmHA housing units] are threatened with loss as a result of the prepayment of mortgages by owners;

> (ii) the loss of this privately owned and federally assisted housing would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing;
> (iii) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations;
> (iv) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

The 1988 legislation, Section 202(a) (emphasis supplied).

(The 1988 Legislation's Interim Measures For Pre-1979 FmHA Contracts)

27. Congress estimated that a large portion of the 367,000 units owned by both pre-1979 and post-1979 loan holders and originating between 1963 and 1985 were vulnerable to being prepaid during the few years following 1988. However, post-1979 FmHA loan holders, which unlike pre-1979 loan holders already were contractually required to maintain their projects as low- and moderate-income housing for fifteen (15) or twenty (20) years, were the subject of continuing reviews of alternative responses to the perceived imminent loss of affordable housing. Thus, until such time as Congress could act on recommendations and devise a permanent solution for all FmHA loans, the 1988 legislation temporarily confined itself to dealing only with the pre-1979 FmHA loans, i.e., those FmHA loans originating from 1963 to 1979.

28. The 1988 legislation constituted an interim measure designed to temporarily place the pre-1979 FmHA contract holders "on the same playing field" as the post-1979 FmHA

contract holders already subject to a restrictive-use clause. For example, a pre-1979 FmHA contract holder could avoid an immediate forced sale of its project by agreeing to extend its low-income use for a period of not less than twenty (20) years from the date of loan origination. The 1988 Legislation, Section 241.

29. Although denominated as an "interim measure," the 1988 legislation specifically amended existing law -- Section 502(c) of the Housing Act of 1949 -- and did not contain a sunset provision. Congress did not revisit this issue and devise a permanent response for all FmHA loans, including those post-1979 loans with contractual termination rights, until 1992.

30. Consistent with the provisions of existing post-1979 FmHA contracts containing restrictive-use clauses, the interim measures of the 1988 legislation temporarily recognized the contractual right of post-1979 FmHA loan holders to terminate their contracts by prepaying their loans at any time at their option provided that the projects were maintained as low- and moderate-income housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

31. Contrary to the provisions of pre-1979 FmHA contracts, the interim measures of the 1988 legislation repudiated the contractual right of said contract holders to terminate their contracts at any time at their option. The 1988 Legislation, Section 241.

The 1992 Legislation

32. On October 28, 1992, Congress amended Section 502(c) of the Housing Act of 1949 by enacting the Housing and Community Development Act of 1992 (Pub. L. No. 102-550, § 2 & Tit. VII, § 712, 106 Stat. 3681, 3841 (1992)(codified in relevant part at 42 U.S.C. § 1472(c))("the 1992 legislation or Title VII").) This amendment eliminated the interim measure status of the 1988 legislation's emergency provisions

repudiating the contractual right of pre-1979 FmHA loan holders to terminate their contracts at any time at their option.

33. In addition to making permanent the temporary repudiation of the contractual termination rights of pre-1979 FmHA loan holders, the 1992 legislation extended said repudiation to those post-1979 FmHA loan holders with the same contractual rights. (42 U.S.C. § 1472(c)(4)(A), as amended.) Thus, the 1992 legislation, signed into law by the President on November 2, 1992, together with implementing regulations, repudiates the contractual termination right of any FmHA loan holder who chooses to terminate its contract.

34. Pursuant to the 1992 legislation, holders of both pre-1979 and post-1979 FmHA contracts are permitted to terminate their contracts by prepaying their loans only in accordance with specified, non-contractual restrictions, including but not limited to the requirement that, before accepting any offer to prepay, the Secretary must make reasonable efforts to enter into an agreement to extend the low-income use of FmHA projects for not less than a period of twenty (20) years beginning on the date the agreement is executed. The 1992 Legislation, Section 712, 42 U.S.C. § 1472(c)(4)(A).

35. The 1992 legislation authorizes FmHA, subject to various conditions and at its discretion, to offer limited, specified "incentives" to holders of FmHA contracts which, along with the threat of the forced property sales discussed below, are designed to induce said contract holders to extend the low-income use of their projects. In general, the incentives allowed owners whose projects satisfied various guidelines to apply for: (i) increases in the rate of return on investment; (ii) reductions of the interest rate on the mortgage loan; (iii) additional rental assistance; and (iv) an equity loan. 42 U.S.C. § 1472(c)(4)(B).

36. The appraisal guidelines used by FmHA to determine incentives are inconsistent with standard

appraisal guidelines and result in value determinations below fair market value.

37. For those FmHA project owners unwilling or unable to extend their participation in the Government's housing programs by acquiescing to the "incentives" outlined above, the 1992 legislation provides for forced sales of said owners' properties to nonprofit organizations or public agencies approved by FmHA which are required to maintain the projects as low income housing, subject to FmHA's approval of financial assistance to the prospective purchasers. Under the lengthy, cumbersome, and costly procedures required, such owners are required to offer their properties for sale to such purchasers for an extended period without receiving "incentives" or any other compensation. 42 U.S.C. § 1472(c)(5)(A) - (F).

38. Such forced sale proceedings can be avoided only if (i) the FmHA project owner agrees to continue to operate its project as low-income housing for a period determined by the Secretary, but not less than twenty (20) years from the date of loan origination, and to subject itself to the forced sale proceeding at the end of that period; or (ii) if the Secretary determines that housing opportunities for minorities will not be materially affected as a result of the prepayment and that either (a) tenants will not be displaced; or (b) there is an adequate supply of affordable rental housing within the market area of the housing that is assured of being made available to all current tenants. 42 U.S.C. § 1472(c)(5)(G).

Material Terms

39. Plaintiffs' contractual right to terminate their contracts at any time at their option was a material term of their contracts. In the absence of this contractual termination right, plaintiffs would not have entered into their contracts with FmHA. But for the 1992 legislation permanently repudiating plaintiffs' contractual termination right, plaintiffs would achieve their option of terminating their

contracts on those dates that would maximize their investment return on their properties, or on such other dates as they deem appropriate given their individual circumstances.

40. Plaintiffs have complied fully and in good faith in all material respects with the terms and conditions of their contracts and have otherwise fully performed their undertakings in connection therewith.

THE IMPACT OF THE 1992 LEGISLATION UPON PLAINTIFFS

41. The statutory scheme under the 1992 legislation and FmHA's implementing regulations repudiate the contractual right of FmHA project owners to terminate their contracts at any time at their option in part by (i) compelling them to extend the low-income use of their projects; and (ii) subjecting them to forced sales of their properties. The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, i.e., the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's repudiation. Thus, the Government's scheme constitutes an anticipatory repudiation of the plaintiffs' contractual termination right.

42. The 1992 legislation complained of herein also results in a taking of plaintiffs' property for public use without just compensation. By requiring plaintiffs to house low-income tenants and to accept new low-income tenants, the Government has (i) conscripted plaintiffs' properties for public use; (ii) physically invaded or authorized others to physically invade plaintiffs' properties; and (iii) deprived plaintiffs of their distinct investment-backed expectations with regard to their properties, all without providing any just compensation.

DAMAGES

43. As a consequence of the Government's conduct, certain plaintiffs have submitted applications for prepayment and/or an offer of incentives from the Government. The Government has in every instance refused to accept prepayment from plaintiffs pursuant to the provisions of their contracts. Some plaintiffs have been compelled to change their position to their detriment in reliance upon the Government's repudiation, including accepting incentives and transferring their properties to third parties in lieu of a sale at fair market value. In light of the Government's repudiation, other plaintiffs have foregone submitting any prepayment application because of the futility of doing so.

44. As a consequence of the Government's conduct, certain plaintiffs have met with, or otherwise made inquiries of, FmHA officials regarding prepayment of their loans. Said Government officials have repeatedly represented to plaintiffs that prepayment will not be accepted. In some cases, Government officials have stated that it is not worthwhile even to file a prepayment application. Further, Government officials who are in positions of authority, trust, and confidence with respect to plaintiffs have represented to plaintiffs that they do not have and never had a contractual right to prepayment, that their contracts were subject to all future regulatory changes, including prepayment prohibitions, and have made various other misrepresentations and misstatements of fact.

45. In addition, during the period of emergency interim measures described above, Government officials led certain plaintiffs to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions.

46. The incentives potentially provided by the 1992 legislation and implementing regulations fall far short of compensating plaintiffs for the damages they have suffered

and will continue to suffer as a result of the Government's repudiation of its contracts with plaintiffs, and would not provide just compensation to plaintiffs for the taking of their property for public use.

47. FmHA has acted arbitrarily and capriciously and not in accordance with law by failing to promulgate regulations and appraisal guidelines that justly compensate plaintiffs for the damages they have suffered and for the taking of their property for public use.

48. As a result of the Government's repudiation of their contractual termination right, plaintiffs have been (i) deprived of their right to use or dispose of their property as they see fit; (ii) compelled to allow the Government to use or authorize others to purchase and use their property to fulfill the Government's undertaking to provide low cost rental housing to a segment of the public meeting Government eligibility standards; and (iii) required to continue to comply with the costly restrictions and obligations imposed upon them by their Loan Agreements.

49. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and selling their properties to third parties. The Government has deprived and will deprive these plaintiffs of earnings on the sales of their properties because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any sale, from taking place.

50. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and converting their properties into commercial housing in which they could obtain rents at market rates in excess of the rents chargeable to low- and moderate-income tenants under the Government's programs. The Government has deprived and will deprive these plaintiffs of the value of increased rents they would receive because its repudiation of plaintiffs' contractual termination

right has prevented any prepayment, and consequently any increase in rents, from taking place.

51. All plaintiffs have suffered other, additional damages including without limitation the lost opportunity costs associated with investment and business opportunities plaintiffs have been foreclosed from pursuing by virtue of their inability to exercise their contractual right to terminate their contracts at any time at their option.

COUNT ONE

(Breach of Contract)

52. Plaintiffs incorporate paragraphs 1 through 51 by reference as if fully set forth herein.

53. Defendant's 1992 legislation anticipatorily repudiated the contract between the defendant and each of the plaintiffs. The Government's anticipatory repudiation has deprived and will deprive each plaintiff of its contractual right to terminate its contract at any time at its option before the expiration date of its forty (40) or fifty (50) year contract term. The Government's anticipatory repudiation constitutes a breach of each plaintiff's contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation.

54. As a direct and proximate result of defendant's conduct, plaintiffs have been damaged in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

COUNT TWO

(Just Compensation)

55. Plaintiffs incorporate paragraphs 1 through 54 by reference as if fully set forth herein.

56. As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use and requires payment to plaintiffs of just compensation under the Fifth Amendment to the U.S. Constitution.

57. Plaintiffs are entitled to just compensation for the taking of their properties in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

AS TO COUNT ONE

1. That the Court award plaintiffs monetary relief for the damages suffered to date and for the damages plaintiffs continue to suffer as a result of defendant's breaches of plaintiffs' contracts, in an amount to be determined at trial.

AS TO COUNT TWO

2. That the Court award plaintiffs just compensation during the period during which plaintiffs' properties have been taken for public use by defendant, in an amount to be determined at trial.

AS TO ALL COUNTS

3. That the Court certify this as a class action.

4. That the Court award plaintiffs their attorneys' fees and expenses as allowed pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c), and other applicable law.

5. That the Court award plaintiffs their costs and interest as allowed by law.

6. That the Court grant such other and further relief as the law and the evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

Dated: September 15, 1998

By: /s/
Jeff H. Eckland
Attorney for Plaintiffs

FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 336-3000
Telecopy: (612) 336-3026

Of Counsel:
William L. Roberts
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 336-3000
Telecopy: (612) 336-3026

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FRANCONIA ASSOCIATES, a Limited Partnership, et al.,	)	File No. 97-381C (Judge Gibson)
Plaintiffs,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DECLARATION OF P.J. PERRI

I, P.J. PERRI, declare as follows:

1. I am plaintiff no. 12 in the above-described action.

2. I entered into a contract with the Farmers Home Administration on May 31, 1978 for a 24-unit apartment project, called Palmyra Park Apartments I, located in Palmyra, Wisconsin.

3. I decided to prepay my mortgage loan on this project without restrictive-use provisions in 1993. I have attached a true and correct copy of my prepayment request, dated November 10, 1993, as Exhibit I.

4. Pursuant to various regulations and FmHA requirements, I submitted to FmHA various financial information as part of my prepayment application. (See Exhibit II.)

5. As indicated in my letter dated March 14, 1994 to FmHA (a true and correct copy of which has been attached hereto as Exhibit III), my prepayment application was complete as of March 1994.

6. FmHA rejected my offer to prepay the mortgage on Palmyra Park Apartments I.

7. As a consequence of being unable to exercise my contractual right to prepay Palmyra Park Apartments I, I

have been compelled to continue owning and managing Palmyra Park Apartments I.

8. I both own and manage Palmyra Park Apartments I, which constitutes an incredible imposition on my time and health.

9. I planned, upon prepayment, to sell Palmyra Park Apartments I to a buyer who would charge commercial market rate rents. It was my intention to leave the business of owning and managing apartment complexes.

10. My intent upon prepayment was to invest the proceeds from the sale of Palmyra Park Apartments I in part to fund my retirement.

11. Instead, I have been forced to continue managing an apartment complex under very stressful conditions, working every weekend. There is no end in sight to my responsibilities.

12. I suffered no damages of any kind, prior to 1993, because it was not until that date that I decided to prepay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 1999 in Madison, Wisconsin.

/s/
P.J. Perri

M2:20243688 01

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

November 10, 1993

Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: PREPAYMENT

Dear Sirs:

In accordance with FmHA Instructions 1965-E and Exhibit C I am requesting approval to pre-pay the following projects.

Palmyra Park Apartments I
322 South Second Street
Palmyra, Wisconsin 53156

It is my intention to complete the process of paying the loan pre-payment no sooner than 180 days from the date of this request.

If I am to pre-pay the loan in less than 180 days I agree to extend all leases and guarantee existing rent and living conditions for at least 180 days or until all current leases expire, whichever is later.

I also agree to continue to administer the housing in accordance with the fair housing policies after pre-payment. (See attached Exhibit B.)

It is also my intention to pre-pay without restrictive-use provision in the release documents.

For tenants entering the project after the date of this prepayment application, the following language will be inserted in an addendum to the lease. See attached Exhibit A-is attached.

All new tenants will receive copies of all letters sent to all existing tenants advising them of the status of the prepayment request.

All additional information and documentation required by FmHA Instructions 1965-E, Exhibit B are attached for your review and acknowledgment.

Sincerely,
/s/
P. J. PERRI

EXHIBIT -A

"The mortgage on this project may be prepaid to the Federal Government on or after _____ . Your rent may be raised to $_____ and/or you may be asked to move from this project."

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

November 10, 1993

Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: FAIR HOUSING CERTIFICATION (Exhibit B)

Dear Sirs:

In accordance with 1965-E, Exhibit C (A), I certify the following:

> I, P. J. PERRI AND MY SUCCESSORS IN INTEREST, WILL CONTINUE TO ADMINISTER THE HOUSING: PALMYRA PARK APARTMENTS I & II IN ACCORDANCE WITH FAIR HOUSING POLICIES AFTER PRE-PAYMENT.

/s/_____
P. J. PERRI, OWNER

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

December 1, 1993

Ray Ellenberger
Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

Dear Sirs:

Attached are applications for pre-payment of the following project owned by me:

> Palmyra Park Apartments I
> 322 S. Second Street
> Palmyra, Wisconsin 53156

I believe the applications have been completed in accordance with 1965E and Exhibits. If the applications are complete, please acknowledge. If not, please inform me of any additional material needed.

Any correspondence concerning these applications should be addressed to my agent as follows:

> John H. Ringstad
> Key Consultants
> 36 Grand Avenue
> Neillsville, WI.
> 54456

Sincerely,

P. J. PERRI

Enclosures

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

March 14, 1994

Mike Daniels
Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: PALMYRA PARK I & II
APPLICATION

Dear Mike,

Enclosed please find the Addendum to the Commitment Letter for the above mentioned projects.

With the receipt of this information, I assume that your review is satisfactory and the application will be processed.

Since four months have passed since this application was given to FmHA I hope the waiting time is over.

I want to thank you for coming to Palmyra to speak with my tenants. They all seemed to understand this time. Thank you for your time and considerations.

Sincerely,

PALMYRA PARK APARTMENTS I & II

P. J. PERRI
Owner

LOAN AGREEMENT
(RRH LOAN TO A LIMITED PARTNERSHIP
OPERATING ON A LIMITED PROFIT BASIS)

1. Parties and Terms Defined. This agreement dated January 24, 1979 of the Pine Needle Apartments, a Partnership, duly organized and operating under Chapter 59, Article 1 of North Carolina General Statutes, (Authorizing State statute) herein called "Partnership," whose post office address is Fletcher, North Carolina, with the United States of America acting through the Farmers Home Administration, United States Department of Agriculture, herein called "the Government," is made in consideration of a loan, herein called "the loan," to Partnership in the amount of $ 1,238,170.00 made or insured, or to be made or insured, by the Government pursuant to sections 515 (b) and 521 (a) of the Housing Act of 1949. The loan may be insured by the Government for the benefit of the lender. The loan shall be used solely for the specific eligible purposes for which it is approved by the Government in order to provide rental housing and related facilities for eligible occupants, as defined by the Government in rural areas. Such housing and facilities and the land constituting the site as herein called "the housing." The indebtedness and other obligations of the Partnership under the note evidencing the loan, the related security instrument and related agreement are herein called the "loan obligations."

2. Execution of Loan Instruments. To evidence the loan, the Partnership shall issue a promissory note signed by general partner for the amount of the loan, payable in installments over a period of fifty years, bearing interest at a rate, and containing other terms and conditions,

prescribed by the Government. To secure the note or any indemnity or other agreement by the Government, the general partner(s) are to execute a real estate security instrument giving a lien upon the housing and upon such other real property of the Partnership as the Government shall require, including an assignment of the rents and profits as collateral security to be enforced in the event of any default by the Partnership, and containing other terms and conditions prescribed by the Government. The general partner(s) are to execute any other security instruments and other instruments and documents required by the Government in connection with the making or insuring of the loan.

3. Equal Opportunity and Nondiscrimination Provisions. The Partnership will execute (a) any undertakings and agreements required by the Government pursuant to Executive Order 11063 regarding non-discrimination in the use and occupancy of housing, (b) Farmers Home Administration Form FmHA 400-1 entitled "Equal Opportunity Agreement," including an "Equal Opportunity Clause" to be incorporated in or attached as a rider to each construction contract the amount of which exceeds $10,000 and any part of which is paid for with funds from the loan, and (c) Farmers Home Administration Form FmHA 400-4, entitled "Nondiscrimination Agreement (Under Title VI, Civil Rights Act of 1964)," a copy of which is attached hereto and made a part thereof and any other undertakings and agreements required by the Government pursuant to lawful authority.

4. Supervised Bank Account. The proceeds of the Government loan and the amount of $ 65,170.00 to be contributed by the Partnership from its own funds and used for eligible loan purposes shall be deposited in a supervised bank account as required by the Government.1/ Amounts of the Government loan in the supervised bank account exceeding $40,000 shall be secured by the depository bank in

advance in accordance with U.S. Treasury Department Circular No. 176. As provided by the terms of the agreement creating the supervised bank account, all funds therein shall, until duly expended, collaterally secure the loan obligations. Withdrawals (or advances) from the supervised bank account by (or for) the Partnership shall be made only on checks (or statements and partial payment estimates) signed by a general partner and countersigned by the County Supervisor of the Farmers Home Administration, and only for the specific loan purposes approved in writing by the Government. The Partnership's share of any liquidated damages or other monies paid by defaulting contractors or their sureties shall be deposited in the supervised bank account to assure completion of the project. When all approved items eligible for payment with the Government loan funds are paid in full, any balance remaining in the supervised bank account shall be applied on the note as an "extra payment" as defined in the regulations of the Farmers Home Administration, and the supervised bank account shall be closed.

5. Accounts for Housing Operations and Loan Servicing. The Partnership shall establish on its books the following accounts, which shall be maintained so long as the loan obligations remain unsatisfied: A General Fund Account, an Operation and Maintenance Account, a Debt Service Account, and a Reserve Account. Funds in said accounts shall be deposited in a bank or banks insured by the Federal Deposit Insurance Corporation, except for any portion invested in readily marketable obligations of the United States as authorized by section 9. The general partner(s) shall execute a fidelity bond with a surety company approved by the Government, in an amount not less than the estimated maximum amount of such funds to be held in said accounts at any one time. The United States of America shall be named as co-obligee, and the amount of the bond shall not be reduced without the prior written consent

of the government. The Partnership in its discretion may at any time establish and utilize additional accounts to handle any funds not covered by the provisions of this agreement.

6. General fund Account. By the time the Government loan is closed or interim funds are obtained to preclude the necessity for multiple advances of loan funds whichever occurs first, the Partnership shall from its own funds deposit in the General Fund Account the amount of $ 26,067.00 . All income and revenue from the housing shall, upon receipt, be immediately deposited in the General Fund Account. The Partnership may also in its discretion at any time deposit therein other funds, not otherwise provided for by this agreement, to be used for any of the purposes authorized in sections 7, 8, or 9. Funds in the General Fund Account shall be used only as authorized in said sections and until so used shall be held by the Partnership in trust for the Government as security for the loan obligations.

7. Operation and Maintenance Account. Not later than the 15th of each month, out of the General Fund Account shall be transferred to the Operation and Maintenance Account sufficient amounts to enable the Partnership to pay from the Operation and Maintenance Account the actual, reasonable, and necessary current expenses, for the current month and the ensuing month, of operating and maintaining the housing not otherwise provided for. Current expenses may include, in addition to expenses occurring or becoming due monthly, monthly accumulations of proportionate amounts for the payments of items which may become due either annually or at irregular intervals, such as taxes, insurance and normal repair and replacement of furnishings and equipment reasonably necessary for operation of the housing. Current expenses may also include initial purchase and installation of such furnishings and equipment with any funds deposited in the transferred from the General Fund account which are not proceeds of the loan or income or revenue from the housing.

8. Debt Service Account. Each month, immediately after the transfer to the Operation and Maintenance Account provided for in section 7, or after it is determined that no such transfer is called for, any balance remaining in the General Fund Account, or so much thereof as may be necessary, shall be transferred to the Debt Service Account until the amount in the Debt Service Account equals the amount of the next installment due on the loan: Funds in the Debt Service Account shall be used only for payments on the loan obligations and until so used, shall be held by the Partnership in trust for the Government as security therefor.

9. Reserve Account. (a) Immediately after each transfer to the Debt Service Account as provided in section 8, any balance in the General Fund Account shall be transferred to the Reserve Account. Funds in the Reserve Account may be used only as authorized in this agreement and until so used shall be held by the Partnership in trust as security for the loan obligations. Transfers at a rate not less than $ 11,215.00 2/ annually shall be made to the Reserve Account until the amount in the Reserve Account reaches the sum of $ 112,150.00 3/ and shall be resumed at any time when necessary, because of disbursements from the Reserve Account to restore it to said sum. Of such sum, at least 50 percent shall be maintained on a cash basis, referred to herein as the "cash reserve." After the cash reserve reaches the required 50 percent of said sum, all or any portion of the balance of said sum may, at the option of the Partnership, consist of an amount, referred to herein as the "prepayment reserve," by which the Partnership is "ahead of schedule" as defined in the regulations of the Farmers Home Administration. Funds in the cash reserve shall be deposited in a separate bank account or accounts insured by the Federal Deposition Insurance Corporation or invested in readily marketable obligations of the United States, the earnings on which shall accrue to the Reserve Account.

(b) With the prior consent of the Government, funds in the Reserve Account may be used by the Partnership--

(1) To meet payments due on the loan obligations in the event the amount in the Debt Service Account is not sufficient for the purpose.

(2) To pay costs of repairs or replacements to the housing caused by catastrophe or long-range depreciation which are not current expenses under section 7.

(3) To make improvements or extensions to the housing.

(4) For other purposes desired by the Partnership which in the judgment of the Government likely will promote the loan purposes without jeopardizing collectibility of the loan, or impairing the adequacy of the security, or will strengthen the security, or will facilitate, improve, or maintain the orderly collectibility of the loan.

(5) To pay dividends to the partners of up to 8% per annum of the borrowers initial investment of $ 91,237.00 4/ provided the Partnership determines that after such disbursement (a) the amount in the Reserve Account will be not less than that required by subsection 9 (a) to be accumulated by that time and (b) during the next 12 months the amount in the reserve Account will be likely not fall below that required to be accumulated by the end of such period.

(c) Any amount in the Reserve Account which exceeds the aggregate sum specified in subsection 9 (a) and is not agreed between the Partnership and the Government to be used for purposes authorized in subsection 9 (b) shall be applied promptly on the loan obligations.

10. Regulatory Covenants. So long as the loan obligations remain unsatisfied, the Partnership shall--

(a) Impose and collect such fees, assessments, rents, and charges that the income of the housing will be sufficient at all times for operation and maintenance of the housing,

payments on the loan obligations, and maintenance of the accounts herein provided for.

(b) If return on investment for any year exceeds 8 percent per annum of borrower's initial investment of $ 91,237.00 4/, the Government may require that the borrower reduce rents the following year and/or refund the excess return on investment to the tenants or use said excess in a manner that will best benefit the tenants.

(c) Maintain complete books and records relating to the housing's financial affairs, cause such books and records to be audited at the end of each fiscal year, promptly furnished the Government without request a copy of each audit report, and permit the Government to inspect such books and records at all reasonable times.

(d) If required or permitted by the Government, revise the accounts herein provided for, or established new accounts to cover the handling and disposition of income from and payment of expenses attributable to the housing or to any other property securing the loan obligations, and submit regular and special reports concerning the housing or financial affairs.

(e) Agree that if any provisions of its organization documents or any verbal understandings in any conflict with the terms of this loan agreement, the terms of the loan agreement shall prevail and govern.

(f) Unless the Government gives prior consent--

(1) Not use the housing for any purpose other than as rental housing and related facilities for eligible occupants.

(2) Not enter into any contract or agreement for improvements or extensions to the housing or other property securing the loan obligations.

(3) Not change the membership by either the admission or withdrawal of the general partner(s) nor permit the general partner(s) to maintain less than a 5 percent financial interest in the organization nor cause or permit voluntary dissolution of the Partnership nor cause or permit any

transfer or encumbrance of title to the housing or any part thereof or interest therein, by sale, mortgage, lease, or otherwise.

(4) Not borrow any money, nor incur any liability aside from current expenses as defined in section 7 which would have a detrimental effect on the housing.

(g) Submit for the housing the following to the Government for prior review not less than 30 days before the effective dates, and for prior approval by the Government.

(1) Annual budgets and operating plans.

(2) Statements of management policy and practice, including eligibility criteria and implementing rules for occupancy of the housing.

(3) Proposed rents and charges and other terms of rental agreements with occupants and compensation to employees of the housing project.

(4) Rates of compensation to officers and employees of the Partnership payable from the chargeable to any account provided for in this agreement.

(h) If required by the Government, modify and adjust any matters covered by clause (g) of this section.

(i) Comply with all its agreements and obligations in or under the note, security instrument, and any related agreement executed by the Partnership in connection with the loan.

(j) Not alter, amend, or repeal without the Government's consent this agreement or the Partnership agreement, which shall constitute parts of the total contract between the Partnership and the Government relating to the loan obligation.

(k) Do other things as may be required by the Government in connection with the operation of the housing, or with any of the Partnership's operations or affairs which may affect the housing, the loan obligation, or the security.

(11) Refinancing the loan. If at any time it appears to the Government that the Partnership is able to obtain a loan upon reasonable terms and conditions to refinance the loan obligations then outstanding, upon request from the Government the Partnership will apply for, take all necessary actions to obtain, and accept such refinancing loan and will use the proceeds for said purpose.

(12) General Provisions. (a) It is understood and agreed by the Partnership that any loan made or insured will be administered subject to the limitations of the authorizing act of Congress and related regulations, and that any rights granted to the Government herein or elsewhere may be exercised by it in its sole discretion to carry out the purposes of the loan, enforce such limitations, and protect the Government's financial interest in the loan and the security.

(b) The provisions of this agreement are representations to the Government to induce the Government to make or insure a loan to the Partnership as aforesaid. If the Partnership should fail to comply with or perform any provision of the agreement or any requirement made by the Government pursuant to this agreement, such failure shall constitute default as fully as default in payment of amounts due on the loan obligations. In the event of such failure, the Government at its option may declare the entire amount of the loan obligations immediately due and payable and, if such entire amount is not paid forthwith, may take possession of and operate the housing and proceed to foreclose its security and enforce all other available remedies.

(c) Any provisions of this agreement may be waived by the Government in its sole discretion, or changed by agreement between the Government and the Partnership, after this agreement becomes contractually binding, to any extent such provisions could legally have been foregone or agreed to in amended form, by the Government initially.

(d) Any notice, consent, approval, waiver, or agreement must be in writing.

(e) This agreement may be cited in the security instrument and any other instruments as the "Loan Agreement of January 24, 1979." (date of this agreement)

Pine Needle Apartments
PARTNERSHIP NAME

BY:

_____ By: s/
_____ George W. Morosani, General Partner
_____ _____

1/ Only loan funds and borrower's funds to be used for an eligible loan purpose may be deposited in the supervised bank account.

2/ In most case figures should be one-tenth of the aggregate sum specified later in the sentence and indicated by footnote 3.

3/ The amount to be inserted will usually be about 10 percent of the value of the buildings and related facilities financed wholly or partially with the loan.

4/ The amount to be inserted shall be determined in accordance with paragraph VIII K of FmHA Instruction 444.5.

o0o